125-224

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 178.

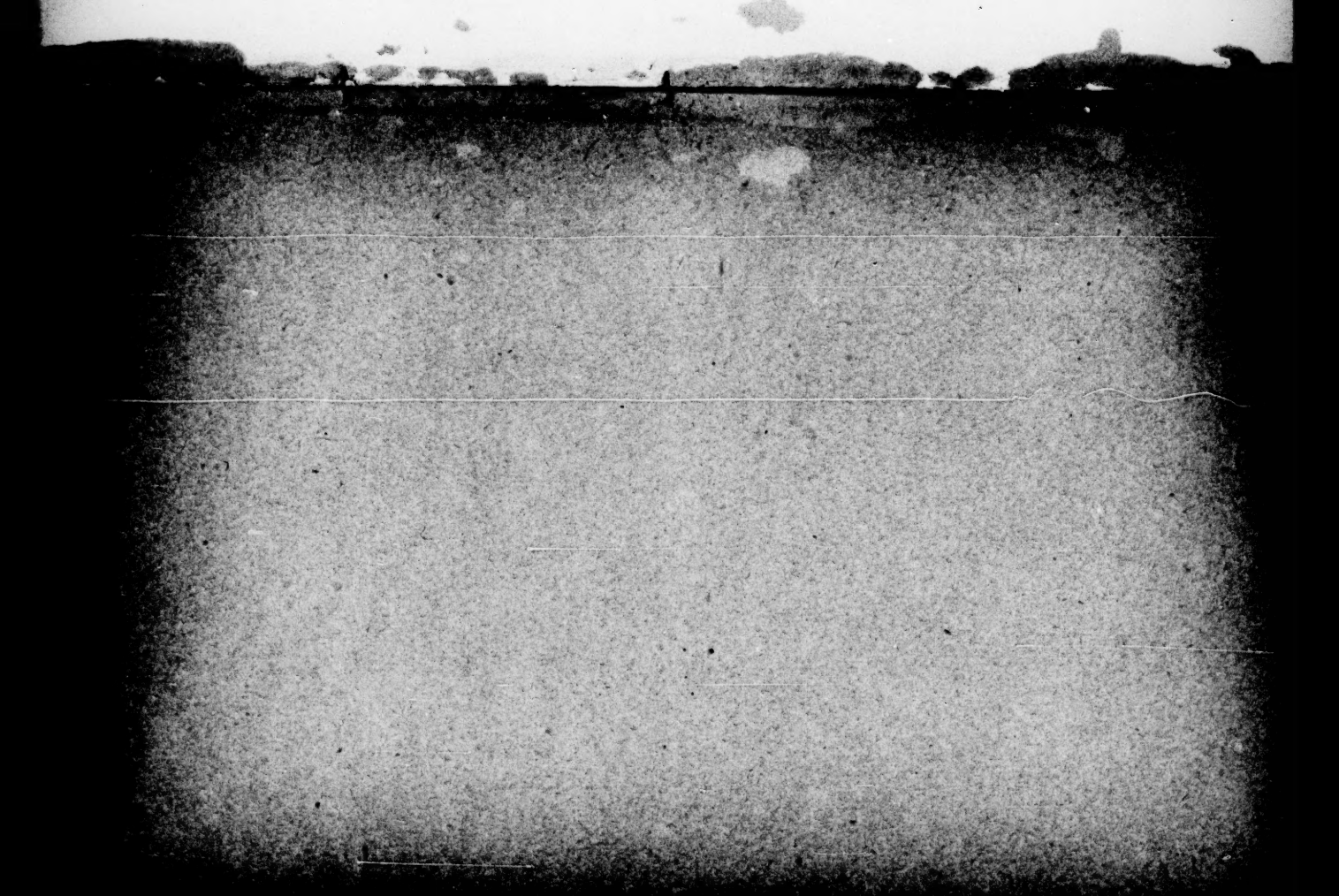
AUGUSTA FRIEDENSTEIN, CLAIMANT OF ONE PACKAGE CONTAINING FORTY-THREE DIAMONDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 8, 1884.



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States of America against One Package Containing Forty-three Diamonds, and Augusta Friedenstein, claimant of said goods, defendant, a manifest error hath happened, to the great damage of the said claimant, as by the record appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the part- aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-four, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

TIMOTHY GRIFFITH, *Clerk.*

The foregoing writ is hereby allowed.

ADDISON BROWN.

2 [Endorsed:] U. S. Supreme Court. 43 Diamonds, &c., plaintiff in error, against The United States, defendant in error. Writ of error. Stanley, Clarke & Smith, att'ys for pl'ff in error. U. S. circuit court. Filed Oct. 9, 1884. Timothy Griffith, clerk.

Oct. 9, '84.—Due service of a copy admitted.

ELIHU ROOT,
J. P. C.,
Att'y for Def't in Error.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America for the Southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to thirty-three, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of One Package Containing Forty-three Diamonds, and Augusta Friedenstein,

claimant of said goods, plaintiff in error, against The United States of America, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, Southern District New York.]

TIMOTHY GRIFFITH, *Clerk.*

Transcript of Record.

United States Circuit Court, Southern District of New York.

FORTY-THREE DIAMONDS, &c., and AUGUSTA FRIEDENSTEIN, Claimant, Plaintiff in Error,

against

THE UNITED STATES, Defendant in Error.

Leopold Wallach, attorney for plaintiff in error, 150 Broadway, New York; Edwin B. Smith, of counsel for plaintiff in error; Elihu Root, United States attorney, for defendant.

U. S. circuit court. Filed June 9th, 1884.

TIMOTHY GRIFFITH, *Clerk.*

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

THE UNITED STATES

vs.

FORTY-THREE DIAMONDS, &c., AUGUSTA FRIEDENSTEIN, Claimant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this ninth day of June, in the year of our Lord one thousand eight hundred and eighty-four, and the Independence of the said United States the one hundred and eighth.

[L. S.] SAM'L H. LYMAN, *Clerk.*

LEOPOLD WALLACH, ESQ.,
Att'y for Cl'm't & Pl'ff in Error.

EDWIN B. SMITH, ESQ.,
Of Counsel for Cl'm't & Pl'ff in Error.

ELIHU ROOT, ESQ.,
U. S. Att'y, for De'f't in Error.

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the district court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court before you, between the United States of America, plaintiff, and One Package Containing Forty-three Diamonds, and Augusta Freidenstein, claimant, a manifest error hath happened, to the great damage of the said claimant, as herein appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of the United States for the southern district of New York, together with this writ, so that you may have the same at the circuit court room, in the post-office building, in New York city, on the first Monday of April, eighteen hundred and eighty-four, in the said circuit court to be then and there held, that, the record and proceeding aforesaid being inspected, the said circuit court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighteenth day of December, in the year of our Lord one thousand eight hundred and eighty-three.

TIMOTHY GRIFFITH, *Clerk.* [L. S.]

The foregoing writ is hereby allowed.

ADDISON BROWN.

Due service of a copy of the within is hereby admitted.
N. Y., Dec. 18, 1883.

ELIHU ROOT,
S. B. C.,
U. S. Att'y.

6 District Court of the United States of America for the Southern District of New York, of March Term, in the year one thousand eight hundred and eighty-three.

Before the Honorable William G. Choate, the district judge.

On the 9th day of March, in the year one thousand eight hundred and eighty-three, comes Stewart L. Woodford, as the attorney of the United States for the said southern district of New York, in a cause of seizure and forfeiture of property under revenue laws of the United States, and informs the court—

That on the 28th day of February, in the year one thousand eight hundred and eighty-three, Wm. H. Robertson, collector of customs for the port and collection district of the city of New York,

seized on land the property described as forty-three diamonds, which he now has within said southern district of New York, as forfeited to the United States for the causes propounded in the following articles:

That the said goods, wares, and merchandise were brought in the ship or vessel, name unknown, from ——, a foreign port or place, and were on the — day of ——, one thousand eight hundred and eighty-two, unladen and delivered from such ship or vessel, within the said port and collection district, without a permit from the collector and naval officer for such unlading or delivery, contrary to sections 2872 and 2874 of the Revised Statutes of the United States, and that the value of said goods, wares, and merchandise, according to the highest market price of the same, at the said port and district, amounts to four hundred dollars.

7 That the said collector, having cause to suspect a concealment of goods, wares, and merchandise in the particular dwelling-house, store, building, or other place, No. 66 Nassau street, in the city of New York, did, on the 27th day of February, one thousand eight hundred and eighty-three, with due warrant therefor, enter the said No. 66 Nassau street, in the daytime, and there search for such goods, and did then and there find the said goods, wares, and merchandise concealed, and did seize and secure the same for trial, and that the duties had not been paid or secured to be paid thereon, contrary to the said section 3066 of the Revised Statutes of the United States.

That the said goods, wares, and merchandise, being articles subject to duty, were, on the 27th day of February, one thousand eight hundred and eighty-three, found in the baggage of a person arriving in the United States and were not, at the time of making entry for such baggage, mentioned to the said collector before whom such entry was made by the person making the same, contrary to section 2802 of the Revised Statutes of the United States.

That the said goods, wares, and merchandise were, on the — day of ——, one thousand eight hundred and ——, imported and brought into the United States in the ship or vessel, name unknown, belonging in the whole or in part to a citizen or citizens inhabitant or inhabitants of the United States, from a foreign port or place, and were not included in the manifest, and belonged or were consigned to the master, mate, officers, and crew of such ship or vessel, contrary to section 2809 of the Revised Statutes of the United States.

That on or about — day of ——, one thousand eight hundred and ——, an unknown person did fraudulently and knowingly import and bring into the United States and assist in so doing the said goods, wares, and merchandise, contrary to law, and did receive, conceal, buy, sell, and in some manner facilitate the transportation, concealment, and sale of such goods, wares, and merchandise after their importation, knowing the same to have been im-

8 ported, contrary to law, contrary to section 3082 of the Revised Statutes of the United States.

And the said attorney of the United States, on behalf of the United States, saith that all and singular the premises are true; and

that by reason thereof, and by force of the statutes in such case made and provided, the aforementioned goods, wares, and merchandise became and are forfeited to the use in the said statutes provided.

Wherefore he prays that due process issue in that behalf, as well of attachment, to bring the said property within the custody of the court, as of monition, to all parties in interest to appear on the return of such process and duly intervene herein by claim and plea to the premises; and, due proceedings being had thereon, that for the causes aforesaid the said goods, wares, and merchandise be condemned by decree of forfeiture and the proceeds of the sale or such other disposition thereof as the court shall direct distributed according to law.

STEWART L. WOODFORD,
United States Attorney for the Southern District of New York.

(Endorsed:) 31117. District court of the United States, southern district of New York. The United States *vs.* 43 Precious Stones (Diamonds) found at No. 66 Nassau St., N. Y. city. Information of forfeiture *in rem.* §§ 2872, 2874, 3066, 2802, 2809, 3082, R. S. Stewart L. Woodford, U. S. attorney. Filed March 9, 1883.

9 *Notice of Appearance.*

United States District Court.

UNITED STATES
against
ONE PACKAGE CONTAINING FORTY-THREE DIAMONDS.

SIR: Please take notice that the claimant, Augusta Friedenstein, appears in this action, and that I am retained as attorney and solicitor for her therein.

New York, March 27, 1883.

Yours, &c., LEOPOLD WALLACH,
Attorney for Claimant, 152 Broadway, New York.

To Elihu Root, plaintiff's attorney.

United States District Court, Southern District of New York.

THE UNITED STATES
vs.
ONE PACKAGE CONTAINING FORTY-THREE DIAMONDS, &c., AUGUSTA FRIEDENSTEIN, Claimant.

10 And now Augusta Friedenstein, intervening for the interest of herself, as hereinafter stated and set forth, appears before this honorable court and makes claim to the said goods, wares and merchandise, to wit, one package containing 43 diamonds, &c.,

as the same are attached by the marshal under precept of this court, at the instance of the United States, and the said claimant avers that she is entitled to possession of the said goods, wares, and merchandise at the time of the attachment thereof and is still so entitled; that she, the person above named, is the true and *bona fide* owner of the said goods, wares, and merchandise, and that no other person is owner of the same.

Wherefore she prays to defend.

AUGUSTA FRIEDENSTEIN.

LEOPOLD WALLACH,
Solicitor for Claimant, 152 Broadway, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

Augusta Friedenstein, being duly sworn, says that she has heard read the foregoing claim, and that the same is true.

Sworn to before me this 24th day of March, 1883.

M. J. COTTER,
Notary Public, City and Co. of N. Y.

(Endorsed:) Filed March 27, 1883.

11 United States District Court, Southern District of New York.

UNITED STATES
against
ONE PACKAGE CONTAINING FORTY-THREE DIAMONDS.

The answer of Augusta Friedenstein, owner and claimant of said one package containing 43 diamonds, to the information filed herein in behalf of the United States.

And now comes Augusta Friedenstein, by Leopold Wallach, her attorney, and, for answer to the above information against said one package containing 43 diamonds, says she is the owner of the goods, wares, merchandise in said information mentioned and every part thereof, and that the said several goods, wares, and merchandise did not nor did any part thereof become forfeited in manner and form as in said information in that behalf alleged.

Wherefore said claimant prays that the said information may be dismissed with costs to the claimant.

AUGUSTA FRIEDENSTEIN.

CITY AND COUNTY OF NEW YORK, *ss:*

On this 6th day of April, 1883, personally appeared Augusta Friedenstein, above named, and made oath that she is the owner and claimant of the goods, wares, and mechandise mentioned above; that she has read and knows the contents of the foregoing information, and that the same is true.

NELSON J. WATERBURY, JR.,
Notary Public, N. Y. City and Co.

(Endorsed:) Filed April 9, 1883.

12 *Bill of Exceptions.*

United States District Court, Southern District of New York. May Term, 1883.

THE UNITED STATES OF AMERICA

against

FORTY-THREE DIAMONDS (AUGUSTA FREIDENSTEIN), Claimant.

This cause came on for trial at the May term of the district court of the United States, held at the city of New York, before Mr. Justice Brown and a jury, on the twelfth day of June, 1883. The United States was represented by its attorney, Mr. Root, and his assistant, Mr. John P. Clarke, and the claimant by her attorneys, Leopold Wallach and Edwin B. Smith.

In the course of the trial the claimant, by her counsel, took and alleged sundry exceptions to the rulings of the court in the admission and exclusion of evidence and to the giving and refusals to give, instructions to the jury, which exceptions are hereinafter severally set forth.

The first witness called by the Government was Capt. Charles M. Brackett, a special agent of the United States Treasury Department, having his office in the custom-house in the city of New York.

He testified that upon the 27th day of February, 1883, in consequence of certain information communicated to him the day before, he went with two subordinates to the store of Goldsmith & Kuhn, No. 66 Nassau street, where they found a man and woman and the package of diamonds which are the subject of litigation.

13 The witness said when he reached the store "the diamonds were in the possession of Goldsmith & Kuhn. They told me that she (the woman) had handed them to them;" that Mr. Kuhn, who was behind the counter, had the package, and handed it to the witness upon his demand of it. The witness took them and requested the woman (Mrs. Sussman) to accompany him to the custom-house, as he wished to make some inquiries about the diamonds.

He took the diamonds to the custom-house, Mrs Sussman accompanying him.

The witness continued: "When I got to the custom-house I telegraphed to Mr. Stevens, the appraiser of diamonds, who came down and opened the package. This, however, was after a conversation had with Mrs. Heckman or Sussman." In answer to a question of counsel for claimant as to when he took the diamonds the witness said: "I took them at the store and took her down to the custom-house with them. If her explanation was satisfactory I did not intend to seize them."

The witness then testified that the package was opened by Mr. Stevens, found to contain diamonds, which were examined and appraised, and after the conversation with Mrs. Sussman were placed in the hands of ex-Gov. Noble, in charge of the seizure room at the

custom-house, he (the witness) taking a receipt for them, and that he then accompanied Mrs. Sussman to the district attorney's office, where she was further examined, and then suffered to depart.

The witness was asked by the district attorney: "When and where did you make the seizure of these diamonds?"

To this inquiry the claimant objected as calling for a conclusion of law, but the court overruled the objection and the claimant excepted.

The witness' reply was: "The seizure of the diamonds was made at the custom-house in this city after I was through with my investigation."

The witness was then asked by the court: "After your examination?" and replied, "Yes, sir."

14 By Mr. ROOT:

Q. Prior to making the seizure did you have any conversation with the woman calling herself Mrs. Heckman or Sussman, in whose possession you found the diamonds?

A. Yes, sir.

Q. Please state what that conversation was.

(Objected to.)

A. She admitted to me that they were hers.

By the COURT:

Q. Who was present and what was done when you first took the diamonds from her?

A. There was a gentleman behind the counter. I understood his name to be Kuhn. Goldsmith & Kuhn was the firm. My attention was called to the woman before I went into the store—that she would be there, and I expected her. I asked her if she had any diamonds with her. This gentleman behind the counter says: "I have a package here that this lady left last night;" and I said, "Madam, is this your package?" She says, "Yes." Said I, "I would like to have you accompany me to the custom-house; I would like to make some inquiries in regard to them."

Q. How did you get hold of the diamonds?

A. Well, this party behind the counter handed them to me, and I asked her if they were hers, and she said "Yes;" that was a package she had left containing diamonds. It appears they had been left for safe-keeping with this party all night.

Q. He said some one gave them to him the night before?

A. Yes, sir; that they had been left at the store the night before.

By Mr. ROOT:

Q. What else happened at the store?

A. I don't remember anything further, sir. I asked her to
15 accompany me to the custom-house with some party with her; I have forgotten his name; a small man; Adolph, I think it is.

Q. The person behind the counter, was it?

A. No, sir; a party in company with her; a small man; he is in court here now; that is the man (pointing him out).

At this point Capt. Brackett's examination was suspended to suit the convenience of another Government witness, Edmund Cohen, who testified that he accompanied Mrs. Sussman to the store of Goldsmith & Kuhn on the morning of February 27, 1883, she carrying the diamonds, for the purpose of selling them to that firm; that the witness said, "Well, gentlemen, have you decided?" They said, "Yes; in a few minutes," and no sooner did they say "in a few minutes" than a custom-house officer came in and asked, "Did you offer any diamonds for sale here?" I said, "Yes, sir." "Who do they belong to?" I said, "To this lady;" and he said, "You better stay here, and Captain Brackett will be in in a few minutes," and he took us to the custom-house. After I was examined I was taken to the district attorney's office and examined there, and then discharged.

Upon cross-examination Mr. Cohen said it was between ten and eleven o'clock in the forenoon that they were at Goldsmith & Kuhn's, and that Captain Brackett took the diamonds from Francis M. Kuhn.

The witness Brackett was recalled, and asked this question by the district attorney: "Now state the conversation between Mrs. Sussman and yourself which occurred prior to the actual seizure of those diamonds in the custom-house and on the same day when she went in company with you to the custom-house with the diamonds."

(The claimant objected to this question because Mrs. Sussman's statement, under the circumstances and at that time, could
16 not affect the claimant; also because the question involved a conclusion of law as to the time when "actual seizure" took place. The court overruled the objection, admitting the question, and the claimant excepted.)

The witness Brackett, in reply to this inquiry, testified as follows: "Well, I asked Mrs. Sussman from whom she got the diamonds. She said they belonged to another party, but she could not give the name of the party, neither would she give her own proper name. I told her, 'If you can give a satisfactory explanation and if these goods have been brought into the port properly, and duties paid, the United States Government don't want them; why do you object?' 'Well,' she says, 'I can't mention the name of the lady to whom these stones belong.' Well, she finally said to me, after some twenty minutes, perhaps, of conversation—there were two other parties in the room, Mr. Cohen sitting outside, and the door open—she said, 'I would like to see you in private.' 'Well,' said I, 'these are my offices here; this is all private—these offices.' 'No,' said she, 'I want to speak to you alone.' Well, I went into the adjoining room with her, and she then said to me, 'These diamonds belong to a lady, as I said before, whose name I won't give. The duty has not been paid on these diamonds. I am ready to go now before the collector and make arrangements to have the duties paid.' 'Well,'

said I, 'I cannot do that, madam.' 'Well,' she says, 'I am ready; it can't be over $400.' I then went back to the room and told her that I could not make any such arrangement with her as that; the diamonds were then under seizure; then I made up my mind to seize them after this conversation. She said the duty would not be over $400; she was ready to go before the collector and make arrangements to pay that duty." The witness also testified that he sent for Gen. Palmer, and that Mrs. Sussman reiterated to Gen. Palmer what she had said to him, the witness.

17 To further sustain the issues the Government then called Geo. W. Palmer, who, after testifying that he was the deputy collector in charge of the seventh division or law department of the custom-house, proceeded, under the objection of claimant's counsel, which objection was overruled and an exception to such ruling duly taken, to give in detail a conversation which he had with Mrs. Sussman at that time of a similar nature to that testified to by Captain Brackett.

It was also proved for the Government, and acknowledged by Mrs. Sussman when on the stand on behalf of the claimant, that she, Mrs. Sussman, had been to Europe and had returned from thence and landed at the port of New York in the latter part of August, 1882.

A verdict was rendered for the Government, condemning the goods.

And because none of the said exceptions so offered and made to the opinions, rulings, admissions, and exclusions of testimony and decisions of the court appear upon the record of the said trial, therefore, on the prayer of the claimant, by his counsel, the said judge has signed and sealed this bill of exceptions, *nunc pro tunc*, as of the said twelfth day of June, 1883.

LEOPOLD WALLACH,
Att'y for Claimant.

Agreed to.

J. P. C.

Allowed and ordered to be filed.

ADDISON BROWN.

18 *Minutes of the Court.*

TUESDAY, *12th June*, 1883.

The court meets pursuant to adjournment and is opened by proclamation.

Present: Judge Brown.

Panel of jurors called (see panel).

THE UNITED STATES
vs.
43 DIAMONDS, &c., 66 NASSAU STREET, N. Y. CITY. } 31117.

This case being called, ordered trial.
Jurors empanelled and sworn:

Edwin G. Dixon.	Peter Kemble.
Richard P. Charles.	Joseph J. Slocum.
William H. Fogg.	Marshall Ayres, Jr.
George C. Chase.	John Backus.
Thomas J. Davis.	James W. Brady.
Peter Volkmann.	George G. Lake.

Assistant United States Attorney Clarke opens for the informants.
Evidence for the informants:
Charles N. Brackett sworn.
Edmund Kohn sworn.
George W. Palmer sworn.
Cyrus A. Stevens sworn.
Jared Keller sworn.
Reca Bechench sworn.
19 Oscar E. Finke sworn.
Simon Sichel sworn.
Duncan B. Harrison sworn.

Mr. Edwin B. Smith, counsel for claimant, moves to dismiss the case; motion denied.

Evidence for claimant:
Adolph Kuhn sworn.
Fanny Sussman sworn.
Charles E. Campbell sworn.

Exhibit 1 put in.

Evidence for informant:
George W. Palmer recalled.
Leopold Appel sworn.

Mr. Leopold Wallach argued for the claimant, and United States Attorney Elihu Root argued for the informants.

Charge is made by the court and the jury retire in custody of an officer competent to conduct them, and upon its return render a verdict for the informants and against the claimant for the condemnation of the goods mentioned in the information, and that the acts complained of therein were done with intent to defraud the United States.

Motion for a new trial made, to be submitted on written briefs during this term.

Adjourned.

20 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 8th day of December, in the year of our Lord one thousand eight hundred and eighty-three.

Present: The Honorable Addison Brown, district judge.

THE UNITED STATES
vs.
FORTY-THREE DIAMONDS, AUGUSTA FRIEDENSTEIN, Claimant. } Vol. 31, page 117.

The jury empanelled to try the issue joined between the United States of America, informants, against 43 Diamonds, Augusta Friedenstein, claimant, having by their verdict found for the United States, condemning the said goods, it is thereupon, on motion of the United States district attorney, ordered that the above-mentioned goods, wares, and merchandise be, and the same are hereby, accordingly condemned as forfeited to the United States.

And it is further ordered that unless an appeal or writ of error be taken to this decree within the time limited by law and prescribed by the rules and practice of this court *that* the clerk of this court issue a writ of *venditioni exponas* to the marshal of the district, and that in the return of said writ the clerk distribute the proceeds according to law; and it is further ordered that unless an appeal or writ of error be taken as above the stipulators for costs
21 pay the amount of costs heretofore taxed by the clerk into the registry of the court, to be thereupon distributed according to law, and in default thereof that an execution issue against them.

[L. S.] ADDISON BROWN.

(A true copy.)

SAM'L H. LYMAN, *Clerk.*

(Endorsed:) Vol. —, No. —. United States district court for the southern district of New York. The United States *vs.* 43 Diamonds, Augusta Friedenstein, claimant. Elihu Root, U. S. dis't att'y. Final decree on verdict. Filed the eighth day of December, 1883.

United States Circuit Court, Southern District of New York. April Term, 1884.

FORTY-THREE DIAMONDS and AUGUSTA FRIEDENSTEIN, Claimant, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error.

And now, on the first Monday of April, 1884, before the justices of said court, comes Augusta Friedenstein, claimant, by Leo-
22 pold Wallach, her attorney, and says that by the record aforesaid there is error in the various rulings hereinbefore excepted to; also in this, that judgment was rendered for the defendant in error and not for the plaintiff in error.

Wherefore plaintiff in error prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings aforesaid as the same more fully appear therein, may be reversed and annulled.

LEOPOLD WALLACH,
Attorney for Plaintiff in Error.

United States Circuit Court, Southern District of New York. April Term, 1884.

FORTY-THREE DIAMONDS and AUGUSTA FRIEDENSTEIN, Claimant, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

And afterwards, to wit, on the first Monday of April, 1884, the United States, by Elihu Root, its attorney, comes into court and says that there is no error either in the record or proceedings aforesaid or in the judgment aforesaid, and he prays that this court
23 may proceed to examine the record and proceedings aforesaid as to the matters assigned for error, and that the judgment herein be in all things affirmed.

ELIHU ROOT,
J. H. C.,
United States District Attorney, Attorney for Defendant in Error.

(Endorsed:) U. S. circuit court, southern district of New York. Forty-three Diamonds and Augusta Friedenstein, pl'ff in error, *vs.* The United States, def't in error. Assignment and joinder in error.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of the United States for the southern district of New York, to be holden at the circuit court room, post-office building, New York city, on the first Monday of April, eighteen hundred and eighty-four, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Augusta Friedenstein, claimant of one package containing forty-three diamonds, — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated December 18, 1883.

ADDISON BROWN.

Consented to.
June 9, 1884.

ELIHU ROOT,
J. P. C.,
U. S. Att'y.

24 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Wednesday, the eleventh day of June, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable William J. Wallace, circuit judge.

THE UNITED STATES, Def't in Error,

ads.

43 DIAMONDS, Etc., AUGUSTA FRIEDENSTEIN, Claimant, Pl'ff in Error.

The above cause coming on for argument this day in error to the U. S. district court, Mr. Edwin B. Smith is heard in behalf of plaintiff in error; Mr. John Proctor Clarke is heard in behalf of defendant in error.

(Judgment of court below affirmed.)

25 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 18th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Wm. J. Wallace, circuit judge.

43 DIAMONDS, AUGUSTA FRIEDSTEIN, Claimant and Pl'ff,

vs.

THE UNITED STATES, Defendant.

In error.

This cause having come on to be heard on the 11th day of June, 1884, before the Hon. Wm. J. Wallace, the circuit judge, on the writ of error heretofore issued herein to the district court of the United States for the southern district of New York to review a final decree therein entered in favor of the United States and against the goods proceeded against, condemning them as forfeited to the United States, and having been argued for the plaintiff in error by Edwin B. Smith, Esq., of counsel, and on behalf of the defendant

26 in error by John Proctor Clarke, assistant United States attorney, and due consideration having been had, it is hereby ordered, sentenced, and adjudged that the decree of the district court herein be in all things affirmed with costs, and that the case be remanded to the district court, whence it came, and that the said district court proceed to execute its final decree, and for such other proceedings as the rules and practice of said court provide and the justice of the case may require.

WM. J. WALLACE.

Endorsed: U. S. circuit court, southern district of New York. 43 Diamonds, Augusta Friedenstein, cl'm't & pl'ff, *vs.* The United States, def't. Decree affirming final decree of district court. Elihu Root,

U. S. att'y, att'y for def't. Due service of a copy of the within is hereby admitted. Leopold Wallach, att'y for cl'm't. U. S. circuit court. Filed Sept. 18, 1884. Timothy Griffith, clerk.

27 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-rooms thereof, in the city of New York, on the 30 day of September, 1884.

43 DIAMONDS, AUGUSTA FRIEDENSTINE, Claimant,
vs.
THE UNITED STATES OF AMERICA.

In error.

The final decree of this court having been signed and entered on the 18th day of September, 1884, affirming the decree of the district court herein with costs, and the costs having been taxed by the clerk of this court at 26.45 dollars, it is now ordered, sentenced, and adjudged that judgment for the United States for said amount of costs be entered against the stipulators for costs on the bond on writ of error heretofore entered into herein, Augusta Friedenstine and John C. L. Hamilton, and that unless an appeal or writ of error be taken from said final decree within the time limited by law and the rules and practice of this court the United States have execution therefor.

WM. J. WALLACE.

28 Endorsed: U. S. circuit court, southern district of New York. 43 Diamonds, Augusta Friedenstine, claimant, *vs.* The U. S. of America, def't. Order. Elihu Root, United States attorney, attorney for defendant. U. S. circuit court. Filed Sep. 30, 1884. Timothy Griffith, clerk.

29 Know all men by these presents that we, Augusta Friedenstein, Fanny Sussman, and John Reese, are held and firmly bound unto the United States of America in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said obligee and its assigns; for which payment, well and truly to be made, we bind ourselves and our heirs, executors, and administrators severally firmly by these presents.

Sealed with our seals. Dated the twenty-fourth day of September, in the year one thousand eight hundred and eighty-four.

The condition of this obligation is such that if Augusta Friedenstein, claimant of certain goods, who has prosecuted a writ of error to the Supreme Court of the United States to review a decree of the circuit court of the United States for the southern district of New York, entered on the 18th day of September, current, whereby judgment was entered against said claimant for $26.45 costs, shall prosecute her writ of error to effect and answer all damages and costs if she shall fail to make her plea good, then this obligation shall be void.

AUGUSTE FRIEDENSTEIN. [L. S.]
FANNY SUSSMAN. [L. S.]
JOHN REESE. [L. S.]

Signed and sealed in presence of—
RICHARD N. ARNON,
Witness as to Fanny Sussman & John Reese.
JOHN S. DERBY,
To Auguste Friedenstein.

30 STATE OF NEW YORK, } ss:
City & County of New York, }

On this 1st day of October, 1884, before me personally came Auguste Friedenstien, to me known and known to me to be the individual described in and who executed the foregoing instrument, and acknowledged that she executed the same.

JOHN S. DERBY,
Notary Public, New York City & Co.

STATE OF NEW YORK, } ss:
City & County of New York, }

On this 30th day of September, in the year one thousand eight hundred and eighty-four, before me personally came Fanny Sussman and John Reese, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they thereupon severally duly acknowledged to me that they had executed the same.

RICHARD N. ARNON,
Notary Public, No. 46, N. Y. Co.

CITY AND COUNTY OF NEW YORK, ss:

31 Fanny Sussman and John Reese, being duly sworn, say, each for himself, that he is worth the sum of ten thousand dollars over and above all his just debts and liabilities.

JOHN REESE.
FANNY SUSSMAN.

Sworn to before me this 30th day of September, 1884.
RICHARD N. ARNON,
Notary Public, No. 46, N. Y. Co.

Endorsed: U. S. Supreme Court. Augusta Friedenstein, pl'ff in error, against The United States, def't in error. Bond. Dated September 14th, 1884. Stanley, Clarke & Smith, att'ys for pl'ff in error, 160 Broadway, N. Y. city. U. S. circuit court. Filed Oct. 9, 1884. Timothy Griffith, clerk. Approved Oct. 9, '84. A. Brown.

32 UNITED STATES OF AMERICA, ss:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, eighteen hundred and eignty-four, pursuant to a writ of error filed in the clerk's office of the circuit

court of the United States for the southern district of New York wherein Augusta Friedenstein, claimant of one package containing forty-three diamonds, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated September 24th, 1884.

ADDISON BROWN.

33 [Endorsed:] U. S. Supreme Court. 43 Diamonds, &c., plaintiff in error, against The United States, defendant in error. Citation. Stanley, Clarke & Smith, att'ys for pl'ff in error.

[Stamped:] U.S. circuit court. Filed Oct. 9, 1884. Timothy Griffith, clerk.

OCT. 9, '84.

Due service of a copy hereof admitted.

ELIHU ROOT,
J. P. C.,
Att'ys for Def't in Error.

Endorsed on cover: S. New York C. C. U. S. No. 178. Augusta Friedenstein, claimant of one package containing forty-three diamonds, plaintiff in error, *vs.* The United States. Filed 8th November, 1884.

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 178.

AUGUSTA FRIEDENSTEIN

AGAINST

THE UNITED STATES.

CLAIMANT'S BRIEF.

Statement.

This is a proceeding to forfeit forty-three diamonds under the revenue laws of the United States.

The libel of information contains five counts (Rec., p. 4).

The first proceeds both upon Sections 2872 and 2874.

The second upon Section 3066.

The third upon Section 2802.

The fourth upon Section 2809.

The fifth upon Section 3082.

The violation of law charged in the first count is an unlading without a permit.

Supreme Court of the United States,

OCTOBER TERM, 1887.

No. 178.

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AGAINST

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The fourth upon Section 2809.

The fifth upon Section 3082.

The violation of law charged in the first count is an unlading without a permit.

That in the second count is that they were goods seized upon warrant at No. 66 Nassau Street, New York City, upon which the duties had not been secured or paid.

In the third, that they were "found in the baggage of a person arriving within the United States," and were not mentioned to the Collector at the time of entry for such baggage.

The fourth, that they were not included in the manifest of the vessel in which they arrived.

Fifth, that some unknown person did fraudulently and knowingly import, or assist in importing, these goods, or did "in some manner" facilitate the dealings in them, subsequently to importation, knowing them to have been imported contrary to law. (*Id.*)

The foregoing sufficiently indicates, for this part of the brief, the legal claims upon which the trial proceeded.

The cause was tried June 12, 1883, and in the course of the trial the below-mentioned questions of law arose (Rec., 7).

The first witness called by the government was Capt. Charles M. Brackett, a special agent of the United States Treasury Department, having his office in the Custom House, in the City of New York.

He testified that, upon the 27th day of February, 1883, in consequence of certain information communicated to him the day before, he went with two subordinates to the store of Goldsmith & Kuhn, No. 66 Nassau street, where they found a man and woman, and the package of diamonds which are the subject of litigation.

The witness said when he reached the store "the diamonds were *in the possession of Goldsmith & Kuhn.* They told me that she (the woman) had handed them to them;" that *Mr. Kuhn*, who was behind the counter,

had the package, and *handed it to the witness upon his* DEMAND *of it.* The witness took them, and requested the woman (Mrs. Sussman) to accompany him to the Custom House, as he wished to make some inquiries about the diamonds.

He took the diamonds to the Custom House, Mrs. Sussman accompanying him. (Rec., 7.)

The witness then testified that the package was opened by Mr. Stevens, (the appraiser of diamonds) found to contain diamonds, which were examined and appraised, and after conversation with Mrs. Sussman were placed in the hands of Ex-Gov. Noble, in charge of the Seizure Room, at the Custom House, the witness taking a receipt for them, and he then accompanied Mrs. Sussman to the District Attorney's office, where she was further examined, and then suffered to depart.

The witness was asked by the District Attorney :

" When and where did you make the seizure of these diamonds ?"

To this inquiry the claimant objected, as calling for a conclusion of law ; but the Court overruled the objection, and the claimant excepted.

The witness' reply was :

" The seizure of the diamonds was made at the Custom House, in this city, after I was through with my investigation."

The witness was then asked by the Court : " After your examination ?" and replied, " Yes, sir." (Rec. 7, 8 ; fols. 13, 14.)

The witness was then asked by the U. S. Attorney, whether prior to making the seizure, he had any conversation with the woman calling herself Mrs. Heckman or Sussman, *in whose possession he found the diamonds.* He said he did ; and was then asked ;

Q. Please state what that conversation was.
(Objected to.)
A. She admitted to me that they were hers.

By the Court :

Q. Who was present, and what was done when you first took the diamonds from her ?
A. There was a gentleman behind the counter ; I understood his name to be Kuhn ; Goldsmith & Kuhn was the firm ; my attention was called to the woman before I went into the store—that she would be there, and I expected her ; I asked her if she had any diamonds with her ; this gentleman behind the counter says, " I have a package here that this lady left last night," and I said " Madam, is this your package ?" she says " Yes ;" said I, " I would like to have you accompany me to the Custom House, I would like to make some inquiries in regard to them."
Q. How did you get hold of the diamonds ?
A. Well, this party behind the counter handed them to me, and I asked her if they were hers, and she said " Yes," that was a package she had left containing diamonds ; it appears they had been left for safe keeping with this party all night.
Q. He said some one gave them to him the night before ?
A. Yes, sir ; that they had been left at the store the night before. *(Ib.)*

The witness was then asked by the U. S. Attorney to state what else happened at the store.

A. I don't remember anything further, sir ; I asked her to accompany me to the Custom House with some party with her ; a small man, in court here now. (Points him out.)

After a brief interruption, to permit the examination of another Government witness (Edmd. Cohen), who testified that Captain Brackett took the diamonds *from Francis M. Kuhn*, ~~that~~ the witness Brackett was recalled, and asked this question by the District Attorney :

"Now state the conversation between Mrs. Sussman and yourself which occurred prior to the actual seizure of those diamonds in the custom house, and on the same day when she went in company with you to the Custom House with the diamonds?"

The claimant objected to this question, because Mrs. Sussman's statement under the circumstances and at that time could not affect the claimant; also because the question involved a conclusion of law, as to the time when "actual seizure" took place; the court overruled the objection, admitting the question; and the claimant excepted.

The witness Brackett, in reply to this inquiry, testified as follows:

"Well, I asked Mrs. Sussman from whom she got the diamonds; *she said they belonged to another party*, but she could not give the name of the party, neither would she give her own proper name; I told her, 'If you can give a satisfactory explanation, and if these goods have been brought into the port properly and duties paid, the United States Government don't want them—why do you object?' 'Well,' she says, 'I can't mention the name of the lady to whom these stones belong;' Well, she finally said to me, after some twenty minutes, perhaps, of conversation—there were two other parties in the room, Mr. Cohen sitting outside, and the door open—she said, 'I would like to see you in private;' 'Well,' said I, 'these are my offices here; this is all private—these offices;' 'No,' said she, 'I want to speak to you alone;' well, I went into the adjoining room with her, and she then said to me, '*These diamonds belong to a lady, as I said before*, whose name I won't give; the duty has not been paid on these diamonds; I am ready to go now before the Collector and make arrangements to have the duties paid;' 'Well,' said I, 'I cannot do that, madam;' 'Well,' she says, 'I am ready; it can't be over $400;' I then went back to the room and told her that I could not make any such arrangement with her as that; the diamonds were then under seizure; then I made up my mind to seize

them after this conversation; she said the duty would not be over $400; she was ready to go before the Collector and make arrangements to pay that duty." The witness also testified that he sent for Gen. Palmer, and that Mrs. Sussman reiterated to Gen. Palmer what she had said to him—the witness. (Rec., 9, 10; fols. 15, 16).

To further sustain the issues the Government then called Geo. W. Palmer, who, after testifying that he was the Deputy Collector in charge of the Seventh Division or Law Department of the Custom House, proceeded, under the objection of claimant's counsel, which objection was overruled and an exception to such ruling duly taken, to give in detail a conversation which he had with Mrs. Sussman at that time of a similar nature to that testified to by Captain Brackett. (Rec. 10, fol. 17.)

A verdict was rendered for the Government, condemning the goods. (*Ib.*, and p. 11, bot.)

Assignment of Errors.

The plaintiff in error assigns for error:

I. That the libel of information, and each and every count thereof, is too defective to found a decree upon. (Rec., 3, 4.)

II. The denial of claimant's motion to dismiss this case. (*Id.*, 11, mid.)

III. The judgment of the District Court upon the verdict: (*Id.*, 12) that the judgment should have been for the claimant, both upon the libel and upon the verdict, and upon the insufficiency of either to sustain a judgment of condemnation. (*Id.*, 12.)

IV. That there is no adjudication of an actual intention to defraud. (*Ib.*)

V. The admission of this question, and the reply thereto :—

"When and where did you make the seizure of these diamonds?" (Rec. 8, top.)

VI. The admission of this question and the answer thereto :—

"Now state the conversation between Mrs. Sussman and yourself which occurred prior to the actual seizure of those diamonds in the Custom House, and on the same day when she went in company with you to the Custom House with the diamonds?" (Rec. 9, mid.)

It had already appeared both by the pleadings and proofs that the actual seizure was at No. 66 Nassau St., before going to the Custom House. (*Id.*, 4, fol. 7; 7 mid.; 8, fol. 14; 9.) At least, it could not be left to the witness to determine "actual seizure." The woman mentioned in the question was not the owner or in possession of the diamonds, and expressly disclaimed their ownership, when she is said to have made the statements testified to in reply to this question. (*Ib.*)

VII. The reception of similar testimony of Geo. W. Palmer. (*Id.*, 10, fol. 17.)

VIII. The judgment of the U. S. Circuit Court. (*Id.*, 14, fols. 25–26.)

POINTS.

I.

The libel is too defective to found a decree upon.

To show this, we shall be compelled briefly to examine each count, seriatim. It will then appear that it was error to deny our motion to dismiss. (Rec., 11, mid.)

Before doing so, however, we wish to place before the Court a few quotations and citations of its early and more recent decisions, indicating the instances and general principles upon which judgments founded upon defective libels of information have been set aside because of such defect.

The libel against the schooner Hoppet may be considered the leading case upon this subject; ever since followed, and frequently cited.

Hoppet, 7 Cranch., 391–395.
Caroline, *Ib.*, 500.
Anne, *Ib.*, 570.

> "Quis, quid, coram quo, quo jure petatur, et a quo,
> Recte compositus quique libellus habet."

"The first question made for the consideration of the Court is this: Will the information support a judgment of condemnation? * * * * *

It is not controverted that in all proceedings in courts of common law, either against the person or the thing, for penalties or forfeitures, the allegation that the act charged was committed in violation of law or of a particular statute, will not justify condemnation, *unless*, independent of this allegation, *a case be stated which shows that the law has been violated.* The reference to the statute may direct the attention of the Court and of the accused to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offense. The importance of this principle," etc. * * *

Does this rule apply to informations in a court of admiralty?

It is not contended that all those technical niceties which are unimportant in themselves, and standing only upon precedents of which the reason cannot be discerned should be transplanted from the courts of common law to the courts of admiralty. *But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offense* upon which the prosecution is founded, *must be the rule of every court* where justice is the object and cannot be satisfied by a general reference to the provisions of a statute."

MARSHALL, C. J., in
Hoppet vs. U. S., 7 Cr., 393–4, *qu. vid.*
U. S. vs. Demijohns, 4 Woods, 637.

The conclusion reached was that the information was not sufficient to base upon it a decree of forfeiture. (7 Cr., 394.)

In another cause at the same term, the Court directed the following decree to be entered:

"This cause came on to be heard on the transcript of the record, and was argued by counsel, on consideration whereof, it is the opinion of the Court that *the libel is too imperfectly drawn to found a sentence* of condemnation thereon. The sentence of the Circuit Court is therefore reversed, and the cause remanded to said Circuit Court with directions to admit the libel to be amended."

The same point was also decided at this term in the cases of schooners Hoppet, Enterprise, Ann and ship Emily.

Caroline, 7 Cr., 500: *Id.*, 570.
Edward, 1 Wh., 269.
Mabey, 10 Wall, 420, mid.

In U. S. vs. Weed, 5 Wall., 68, the early cases, and MARSHALL'S (C. J.) language *in re* Hoppet, are quoted, prefaced by the remarks:

"It would seem to violate all rules of pleading, as well as all the rules of evidence applicable to penal forfeitures, to hold that in such circumstances we can

proceed to condemnation. The right of the claimant to be informed *by the libel of the specific act* by which he or his property has violated the law," etc. . . . " are as fully recognized by the admiralty courts (in all except prize cases) as in the courts of common law." 5 Wall., 68.

Admiralty Rule XXII. is in conformity with these decisions :

" All informations and libels . . . . . *shall also propound in distinct articles the matters relied on as grounds of forfeiture*, AND aver the same to be contrary to the form," etc.

Although process against an inanimate thing is not, perhaps, under ordinary legislation, *strictly* criminal process, yet its character and effect are such that the strictness of construction of the criminal law is applied to informations for forfeitures ;—especially where the statute makes personal criminal intent the gist of the whole proceeding ; so that the basis is " Part *crime* and part *interest*."

King vs. Berchett, 1 Show., 107 top.

The prosecution is quasi criminal.

Boyd vs. U. S., 116 U. S., 634, mid.
Coffey vs. U. S., *Id.*, 436.
Fisher vs. McGirr, 1 Gray, 27 top.

We wish the Court especially to notice that these forfeiture cases now stand upon a very different footing, as to the strictness of pleading and proof, *from what they did prior to the enactment of the Act of June 22, 1874*, C. 391, § 16, (18 Stats., 189), making ' ACTUAL ' criminal intent the gist of the matter and the one thing which the Court *must* specially submit to the jury as a " distinct and separate proposition." (*Ib.*)

U. S. vs. 3 Trunks, 7 Sawy., 366.

" Sec. 16. That in all actions, suits and proceedings in any Court of the United States now pending or

hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares or merchandise, or to recover the value thereof, or any sum alleged to be forfeited by reason of any violation of the provisions of the customs-revenue laws, or any of such provisions, in which action, suit or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the Court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether THE ALLEGED ACTS were done with an *actual* intention to defraud the United States, and to require upon *such* proposition A SPECIAL FINDING by such jury :

" Or, if such issues be tried by the Court without a jury, it shall be the duty of the Court to pass upon and decide such proposition as a distinct and separate finding of fact ;

"And in such cases, unless intent to defraud shall be *so* found, no fine, penalty or forfeiture shall be imposed." (18 Stats., 189.)

Under previous legislation, *actual* fraud was not necessary to be proved to sustain a forfeiture for breach of the customs-revenue laws.

Sinn vs. U. S., 14 Blatch., 552 top, 554 top.
U. S. vs. McKim, 3 Pittsb., 155.
U. S. vs. Malt, 8 Fed. Rep., 224.
U. S. vs. Curtis, 16 *Id.*, 184.
U. S. vs. Barnes, 6 Ben., 183.

Because of the hardship of which the last-cited case is a signal example, this anti-moiety act was passed.

2 Cong. Rec., 1st Sess. 43d Cong., Pt. V, pp. 4026 to 4034.

In reporting the bill, the Chairman of the Com., at the bottom of page 4031, said that the " monstrous forfeitures " of our revenue laws had grown, *inter alia*, from this cause,—

" THIRD, that the perpetration of *any* illegal act of importation is technically fraud, and carries with it the penalty, whatever the *intent* of the importer."

Whenever criminal *intent* is the basis of a legal procedure, the proceedings—whatever the form—are of a criminal nature, and the question involved is one of criminal law; as Bishop thus expresses it in the sixth edition of his work upon criminal law;—commenting upon the famous Massachusetts liquor-law case of Fisher vs. McGirr, 1 Gray, 1 to 48:—

"§ 834. In the Mass. case, the forfeiture of the property was, by the Stat. itself, made to depend upon *an intent in the mind of its owner;* that is, it was to be forfeited when kept for sale contrary to law. And, disguise the real fact as we may, under whatever form of words, *if the intent* (located in the owner's breast, not attached to the thing to be forfeited) *is the pivot* on which the forfeiture turns, then *the question is one of criminal law*, and the forfeiture is a *penalty for the crime*," etc.

1 Bish. Cr. Law, §§ 833–4, *et seq.*

Recurring to § 16 [*ante*, p. 10] we find it incorporates this special element of fraudulent intent into every action, suit, or proceeding in any court of the United States, and *attaches it to every act then or theretofore made a ground of forfeiture*, "by reason of *any* violation of the provisions of the customs-revenue laws, or *any of such provisions.*"

Hence, it should be expressly stated as one of the material—*the* material (U. S. vs. Buzzo, 18 Wall., 126) statutory element in every such action, suit or proceeding.

U. S. vs. 90 Demijohns, 8 F. R., 485; 4 Woods, 637.
U. S. vs. Staats, 8 How., 44.

No fraudulent intent is charged as to any one of the acts generalized (it would be a misnomer to say "specified") in this so-called "information." (Rec., 4.)

The jury were not authorized to find, as to any material fact, except *secundum allegata* (7 Cr., 395, top).

Cloutman vs. Tunison, 1 Sumn., 375, top.

WOODS, J., in above-cited case, says :

"I think it perfectly clear that this section makes an intent to defraud the United States a necessary condition to the forfeiture of any goods, etc., for the violation of the customs-revenue laws. *A libel of information*, therefore, *which undertakes to state a case for the forfeiture of goods should aver an intent to defraud* the United States. *Without such an averment no case for forfeiture is made. The claimant might well decline to answer a libel in which such averment was wanting;* trusting to the Court to dismiss the libel for want of necessary averments," etc. 8 F. R., 486 ; 4 Woods, 639.

U. S. vs. Wentworth, 11 F. R., 54.
U. S. vs. Painting, 31 *Id.*, 881–2.
Snow-Drop, 30 *Id.*, 80 bottom.
Purissima, 24 *Id.*, 360, bottom.
U. S. vs. Simmons, 96 U. S., 364, near top.
Com. vs. Shaw, 7 Metc., 56.
Peo. vs. Lohman, 2 Barb., 218.
St. vs. Card, 34 N. H., 515, near bot.
Cragin vs. Lovell, 109 U. S., 199, bot.
U. S. vs. Jackson, 104 Id., 43.

The district judge (SETTLE) had, *suo sponte*, dismissed the libel, after default made, for this omission ; and Judge Woods thus confirms the decree of dismissal.

In our case the Judge denied the motion. (Rec., 11, mid.)

In so doing he followed his own previously-declared opinion.

U. S. vs. Curtis, 16 F. R., 184.

It will be seen that the district judge in the last-cited case, concedes (as every one must) that *if a* fraudulent intent *is* made part of the statutory offense, it must be alleged. U. S. vs. Jackson, 25 F. R., 550, bot.

But he satisfies himself that it is *not* made an element, even in cases where he feels constrained to submit this very question of intent to a jury "as a separate and distinct finding of FACT !"

How it is possible to reconcile these two things remains—notwithstanding the expression the judge has

given of his views (in the Curtis case)—incomprehensible to us.

The "actions, suits and proceedings" authorized under existing customs-revenue laws, are multitudinous. It would have been tedious, uncertain and superfluous to attempt a reference to the several acts and sections. Therefore, Congress, by this general provision, thus incorporated this new element of *fact* into *every* such section. The *legal effect* is the same as if it had been specially recited in every separate provision authorizing such action, suit, or proceeding. How *can* it be otherwise?

How can the jury be asked to make a separate finding of a fact which it is immaterial to allege?

Where "intent is deemed an essential ingredient in constituting the offence, the indictment will be defective *even after verdict*, unless the intent is averred. The rule has been adhered to with great strictness; and *properly* so, where this intent is a material element of the crime."

U. S. vs. Staats, 8 How., 44.
U. S. vs. Jackson, 2 F. R., 504, LOWELL, C. J.
U. S. vs. Corbin, 11 *Id.*, 242,
quoting Archb. Pl. & Ev., 46.

"If any particular bad intention accompanying the act be necessary to constitute it a crime, *such intent should be laid in the indictment.*" 1 Ch. on Pl., *404.
2 Wait's Pr., 396.
Moorman vs. State, 24 Miss., 56, 57.
Farwell vs. Smith, 1 Har., 136, HORNBLOWER, C. J.

"When a particular intent, accompanying an act, is requisite to constitute a crime, it should be averred in the indictment."

Peo. vs. Lohman, 2 Barb., 218.
St. vs. Gove, 34 N. H., 515, bot.
Gabe vs. St., 1 Eng. (Ark.), 519.
Com. vs. Morse, 2 Mass., 128.

Even the implied intention of the Legislature is as much part of the statute as what is expressed.

U. S. vs. Freeman, 3 How., 565.
U. S. vs. Babbitt, 1 Bl., 61; 95 U. S., 334.

Hence, it was long ago held, in Massachusetts, that whatever is thus implied in a penal statute must be alleged, else judgment will be arrested. 92 Me 798
St v. Mason, 13 Ind, 341.
Reed vs. Davis, 8 Pick., 514. " v. Thos, 55 Me., 260.
Harrington v. St, 54 Mich, 494, 83.

So this Court held in

U. S. vs. Carll, 105 U. S., 611,

and the numerous cases cited at the top of page 613.

Com. vs. Slack, 19 Pick., 304.
U. S. vs. Brindle, 110 U. S., 694.
U. S. vs. Noelke, 17 Blatch., 560.
Hoppet, 7 Cranch, 392, *et seq.*
Moss vs. Riddle, 5 *Id.*, 357–8.
Com. vs. Morse, 2 Mass., 128.

(Here, the intention of the Legislature is emphatically, and even tautologically, expressed.)

Where the law makes fraud an element, it is error to admit evidence of it unless it has been alleged.

Faure vs. Martin, 7 N. Y., 218.
Addington vs. Allen, 11 Wend., 375.
Star vs. Mitchell, 1 Ab. Pr. (N. S.), 396.
Noonan vs. Lee, 2 Black, 500, § 11.
Woodcock vs. Bennett, 7 Cow., 134, top.
U. S. vs. Jackson, 104 *U. S.*, 43.
Cragin vs. Lovell, 109 *Id.*, 199.

It is only another way of stating the same legal proposition to hold, as this and other tribunals have done, in the cited and multitudinons other cases, that " it is not sufficient to set forth the offense in the words of the statute unless those words of themselves *fully*, directly and expressly, without any uncertainty or ambiguity set forth *all the elements of the offense* intended to be punished," etc.

U. S. vs. Carll, 105 U. S., 612.
U. S. vs. Simmons, 96 *Id.*, 360.
U. S. vs. Cruikshank, 92 *Id.*, 542.
Com. vs. Clifford, 8 Cush., 217.
U. S. vs. Mills, 7 Pet., 142.
U. S. vs. 78 cases, 2 Bond, 273.

Peo. vs. Wilber, 4 Park., c. c., 21.
Com. vs. Chase, 125 Mass., 202.
Com. vs. Miller, 2 Pars. (Pa.), 480.
Pearce vs. State, 1 Sneed, 67.
Com. vs. Thurlow, 24 Pick., 374.
Bates vs. State, 31 Ind., 74.
Wharton's Cr. P. & P., §§ 154, 220, 221.
U. S. vs. Crosby, 1 Hughes, 454.
Given vs. Webb, 7 Robt., 65.
Scofield vs. Whitlegge, 49 N. Y., 261.

"Examples of the kind where it has been held that it is not sufficient to follow the words of the statute are quite numerous, and they show that many of the exceptions are as extensively recognized and as firmly settled as any other rule of pleading in such cases. Views of a corresponding character are expressed by this Court in another case, where the opinion was delivered by Mr. Justice STORY. Having stated the rule that it is in general sufficient to allege the offence in the very terms of the statute, he proceeds to remark: "We say in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the Legislature or from the known principles of law, both of which exceptional requirements are applicable in this case."

U. S. vs. Mann, 95 U. S., 586.

Hence, after verdict, judgments have frequently been arrested or reversed for want of sufficiently specific allegations in the information.

Farwell vs. Smith, 1 Har., 136.

WARE, J. The other causes assigned for the arrest of judgment, and which have been insisted upon in the argument, may all be resolved into one, and that is, that the offense is not set out in the information with that clearness and distinctness which is required by the rules of pleading and the practice of the Courts. It was long ago held by the Supreme Court that an information to recover a penalty, under the Collection Act of 1799, *is in the nature of a criminal proceeding.* The description of the offense for which the penalty is demanded must have the same kind and degree of cer-

tainty that is ordinarily required in *other* criminal proceedings.

U. S. vs. 3 parcels, 3 Ware, 75.
U. S. vs. 78 cases, 2 Bond, 273.

JUDGE WARE thus concludes his opinion:

"Under this section of the statute, it appears to me that the design in making the invoice is an essential part of the offense. If it is so, the rules of pleading require that it be *distinctly* alleged. *If it be said that the jury*, under the direction of the Court, *found the fact*, it is still true that by the strict rules of pleading in penal causes, the plaintiff can recover only according to the allegation as well as his proofs." Judgment arrested. (June 11, 1856.) 3 Ware, 81, bottom.

Rhode Island, Olc., 511.
Davis vs. Leslie, 1 Ab. Adm., 129, top.
Dunl. Ad. Pr., 112, 119, *120 top*,
citing 1 Chit. on Pl., 285, and Law's Ex. Law, 147.
State vs. Packard, 4 Or., 160.
State vs. Perham, *Ib.*, 188.
State vs. Simpson, 73 No. Car, 271.
Com. vs. Stout, 7 B. Mon., 248.
State vs. Jackson, 7 Ind., 271, top.
Bates vs. State, 31 *Id.*, 74.
Quinn vs. State, 35 *Id.*, 485.
State vs. Record, 56 *Id.*, 109.
Anthony vs. State, 29 Ala., 28.
Danner vs. State, 54 *Id.*, 130.

The complaint, in its several counts, alleges facts which (as alleged) do not constitute a ground of forfeiture, terminating with a conclusion of law.

Let us now examine the several counts, or articles propounded, to see which (*if any*) sufficiently indicates a ground of forfeiture. If one alone should be found legally sufficient, then to that must be applied the evidence admitted against our objection.

Taking them in their order we find this to be the crime charged in the

FIRST COUNT. "That the said goods, wares and merchandise were brought in the ship or vessel, name unknown, from , a foreign port or place, and were on the day of , one thousand eight hundred and eighty-two, unladen and delivered from such ship or vessel, within the said port and collection district, without a permit from the collector and naval officer for such unlading or delivery, contrary to sections 2872 and 2874 of the Revised Statutes of the United States; and that the value of said goods, wares and merchandise, according to the highest market price of the same, at the said port and district, amounts to four hundred dollars" (Rec., 4, top.)

R. S., Sec. 2872, prohibits the unlading or delivery of any merchandise brought in any vessel from any foreign port without a permit from the Collector and naval officer, *if any*.

Sec. 2874 forfeits merchandise so unladen, and authorizes the seizure of the vessel if the value of the merchandise exceeds $400.

So far as the goods themselves are concerned, this amount of value is quite immaterial.

The count states no particular vessel, but does say it was by some vessel "name unknown."

As to the port, it neither gives any name, *nor states the name to be unknown.* If known, it should be mentioned; if unknown, the libel should say so.

U. S. vs. Reed, 1 Low., 232.

Neither does it state any time, except the year.

"The doctrine seems to be that if a witness, examined by the prosecutor on the trial, swears that he knows the person, stated in the indictment to be unknown, and if it appear that he gave testimony before

the grand jury disclosing the name, the indictment cannot be sustained."

White vs. Peo., 32 N. Y., 471, affirming 55 Barb., 606.
State vs. Wilson, 30 Conn., 507.
U. S. vs. Stetson, 3 Wood. & M., 167.
Cameron vs. St., 13 Ark., 718; 16 *Id.*, 502.
Blodgett vs. St., 3 Ind., 404.
Stone vs. State, 30 Ind., 116.
Cheek vs. State, 38 Ala., 234–5.
Rex vs. Robinson, 1 Holt, 595; 3 E. C. L., 233.
Rex vs. Walker, 3 Campb., 264.
Com. vs. Moore, 11 Cush., 600.

As to the defective allegation of *time*.

1 Ch. Pl., 257; Steph., c. 2, § 4, note 2; Gould, c. 3, § 63.
Com. vs. Moore, 11 Cush., 600.
Rex vs. Holland, 5 T. R., 607.
Roberts vs. State, 19 Ala., 526.
Sanders vs. St., 26 Tex., 119.
Slack vs. State, 30 *Id.*, 354.
State vs. Baker, 34 Maine, 52.
St. vs. Hanson, 39 *Id.*, 337.

In Maine the rule is applied in civil causes. See late case.

Cole vs. Babcock, 79 Me., ; 59 *Id.*, 241; 67 *Id.*, 520; 72 *Id.*, 114; 75 *Id.*, 302.
Ring vs. Roxborough, 2 Cr. & J., 418.

Notwithstanding liberal statutes, as to pleading, it has been repeatedly held fatal to leave the *day* of the month blank.

Clarke vs. State, 34 Ind., 436.
King vs. State, 3 Heisk., 150.
Com. vs. Hutton, 5 Gray, 89 (50 Mass.)
Com. vs. McLoon, *Ibid.*, 91.
U. S. vs. Winslow, 3 Sawy., 337.

It alleges only the want of a permit from the (some) "collector *and* naval officer"; without any averment

that there *was* then a naval officer at the port of unlading.

If there was not (*then and there*) a naval officer, the collector's permit would suffice. The naval officer's joinder is only hypothetically required in the statute; the collector's assent is alone a *sine qua non.*

It is entirely consistent with every allegation of this count, that the diamonds were unladen upon a *collector's* permit, in the absence of any naval officer at the time and place of unlading.

The averments should exclude the idea of the possibility of the goods having been landed in conformity with law.

State vs. Godfrey, 24 Me., 232.
State vs. Philbrick, 31 *Id.*, 401.
Peo. vs. Gates, 13 Wend., 311.
U. S. vs. Britton, 107 U. S., 670.

"Moreover, there must be such an averment of facts as shows, *prima facie*, guilt in the defendant; and if, supposing all the facts set out to be true, there is—because of the *possible* existence of some facts not mentioned—room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient."

1 Bish. Cr. Pro., § 325, citing cases.
Rex vs. Wheatley, 2 Bur., 1127.

"But, regardless of fact, the court must, in obedience to a well-settled rule, make every presumption in favor of the prisoner which the indictment will authorize; and this, too, even after verdict."

State vs. Seay, 3 Stew., 130, bot.

Our objection (in short) to this count is, that it states neither time, place nor circumstance of any offense. It saith not *when* anything was done; nor whence, nor in what vessel the goods came; nor do all things alleged *necessarily* cause a forfeiture, or constitute any offense.

Peo. vs. Minnock, 52 Mich., 628.

Manifestly, this count was intended to cover future discoveries, if any were made—which were not.

The carelessness with which this count was drawn is shown by the insertion of the value, material only as against the vessel.

The second count (which the exceptions indicate as the one the Government started out to prove) is as follows:

SECOND COUNT. That the said collector having cause to suspect a concealment of goods, wares and merchandise, *in the particular dwelling house, store, building* or other place, *No. 66 Nassau street*, in the City of New York, did on the 27th day of February, one thousand eight hundred and eighty-three, *with due warrant therefor*, enter the said No. 66 Nassau street, in the daytime, and *there* search for such goods, and did *then and there* find the said goods, wares and merchandise concealed, *and did seize and secure the same* for trial; and that the duties had not been paid or secured to be paid thereon, contrary to the said section 3066 of the Revised Statutes of the United States. (Rec. 4, top.)

A glance at that section shows that its design was not to create a substantive offense, but merely to authorize the issue of a warrant for a search and seizure.

Failure to pay the duties was not a violation of *that* section, but of sections 2865 *as amended Feb. 27, 1877*, (19 Sts., 247), and section 3082, if not repealed.

If so, this count is bad. U. S. vs. Goodwin, 20 Fed. R., 238.

This count, certainly, states no offense. It does not allege that the goods sought for, seized, and of which a forfeiture is claimed were *dutiable* or *imported*. Though the statute does not employ either word, it is manifestly *implied;* so it must be alleged in the libel

(Com. vs. Slack, 19 Pick., 304, and other cases *supra*). Of course, the collector has no right to institute search for and seizure of *any* merchandise; *i. e.*, confessedly domestic manufactures (King vs. Aho, 5 Hawaiian, 568–9).

Taken in its generality, as applicable to *all* merchandise, and as followed in this count, the section would be unconstitutional, as authorizing a search manifestly unreasonable, and as interfering with the ordinary police power of the States. (*Ib.*)

If the Court cannot limit the phraseology, so as to apply only to goods and objects of Federal cognizance, the provision is void.

U. S. vs. Reese, 92 *U. S.*, 221.
U. S. vs. Cruikshank, *Ib.*, 542.
U. S. vs. Fox, 95 *Id.*, 672–3.

If this count was relied upon, it was necessary to prove *just that seizure which was alleged.*

Silver Spring, 1 Spr., 551.

A seizure is the basis of jurisdiction.

Ann, 9 Cranch, 291.
Rio Grande, 23 Wall., 458, and cases *passim.*

"Judicial proceedings *in rem* to enforce a forfeiture cannot in general be properly instituted until the property inculpated is previously seized by the *executive* authority; as *it is the preliminary seizure of the property that brings the same within the reach of such legal process.*

Dobbins' Distillery, 96 U. S., 396, top.
Pelham vs. Rose, 9 Wall., 103.

It appears to us that the Courts below confounded what has been sometimes said about the *judicial* seizure (by the Marshal) with the *executive* seizure by revenue officers; and overlooked the difference between the

former, as a basis of jurisdiction, and *the express recital* of the lattter in the pleadings.

The Fideliter, 1 Sawy., 153.

Being an executive act, done under "due warrant therefor," it was not competent for the seizing officer to hear testimony in order to decide whether or not he should execute his warrant by making the seizure which he had, in fact, already made.

U. S. vs. Case Silk, 4 Ben., 526.

Suppose Capt. Brackett to be sued for trespass in entering No. 66 Nassau St., and taking from thence and from the possession of Francis M. Kuhn, these diamonds : there can be no doubt that he would justify these acts by his warrant and a seizure made under it.

"The sheriff, while in the discharge of his official duties, *cannot* divest himself of his official character, and do as an individual what he cannot do as a public officer."

Ball vs. Pratt, 36 Barb., 409.

If that seizure, or the seizure mentioned in § 3066, is necessary to be stated, it must be *truly* stated—especially as it is a fact that *must* be known to the government officers—and the recovery must be *secundem allegata*.

SILVER SPRING, 1 Sprague, 551.

But, as will be further noticed in discussing the exceptions, the trial proceeded upon the theory that the prosecution could utterly ignore this statement, and show that no seizure was made at the time and place mentioned—but later, elsewhere ; while we contended "that a finding which contradicts a fact admitted in the pleadings is to be disregarded."

McFerran vs. Taylor, 3 Cr., 280.
Thomas vs. Austin, 4 Barb., 265.

Page vs. Willet, 38 N. Y., 28.
Bridge vs. Payson, 5 San., 210.
Getty vs. Hamlin, 11 N. Y. St. Rep., 98–9.

"*It cannot be presumed*, IN THE FACE OF THE RECORD, that *an* ILLEGAL *seizure was made*, or that SOME ACT WAS DONE THAT DID NOT AMOUNT TO A SEIZURE."

Miller vs. U. S., 11 Wall., 294.
Gould vs. Ray, 13 Wend., 637 bot.
Winter vs. U. S., Hempstd., 344.
Watson vs. Dunlap, 2 Cr. C. C., 14.
Lincoln vs. Fitch, 42 Me., 467.
Hartley vs. Hartley, 3 Met. (Ky.), 60.
Owen vs. Jones, 14 Ark., 502,

where it was held that the form and nature of the declaration made the *time* alleged material.

Henderson vs. R. R., 123 U. S., 65, close of Op.

It can make no difference that these are proceedings instituted by the Government. Every plaintiff or party is bound by such issues as he presents for trial. If the United States, by its legal representative initiates litigation,

"They then stand, in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors."

The Siren, 7 Wall., 154.
U. S. vs. Bostwick, 94 U. S., 66.
U. S. vs. Bank, 96 *Id.*, 36.

"The State is bound by her judicial pleadings and admissions the same as private persons, and *is entitled to no greater right or immunity as a litigant* than they are."

St. vs. Taylor, 28 La. An., 462.
State vs. Ober, 34 *Id.*, 361.
State vs. Judges, *Ib.*, 1220.
Boatner vs. Scott, 1 Rob. (La.) 546.
Stilley vs. Stilley, 20 La. An., 55.

THIRD COUNT. That the said goods, wares and mer-

chandise being articles subject to duty, were on the 27th day of February, one thousand eight hundred and eighty-three, found in the baggage of a person arriving within the United States, and were not, at the time of making entry for such baggage, mentioned to the said collector before whom such entry was made, by the person making the same, contrary to section 2802 of the Revised Statutes of the United States. (Rec., 4.)

This count literally follows the language of the section mentioned; neither naming any person so arriving, nor alleging that his name was unknown; when he arrived, (may be ten years ago); nor the port of arrival, nor its collector, nor that they were unknown; (1 Low., 232.) *Nor*—affirmatively, or otherwise than argumentatively and by inference, if at all—*that ever any entry was made* of the baggage in which these goods are said to have been found!

Com. vs. Maxwell, 2 Pick., 143.
Com. vs. Shaw, 7 Metc., 56.

Unless there was an entry, from which they were omitted, then no offense under *this* section of the Revised Statutes was possible.

The libel says here they were Feb. 27, 1883, "found in the baggage of a person arriving," etc.

The libel was filed Mar. 9, of that year; (Rec. 5, fol. 8, last line.) that is to say, within the fifteen days allowed for making the entry (R. S., § 2785.), *if* the date of Feb. 27, also attaches to the arrival as well as to the finding!

That the name of the person arriving should either be stated or averred to be unknown, see previous citations; especially

U. S. vs. Simmons, 96 U. S., 362, bottom.

This statute supposes the arrival of a particular vessel at a certain port; that entry has been made of the baggage on board to the proper collector; but that the seized goods were not mentioned in such entry. It

assumes a knowledge, upon the part of the government of the very entry, from which the articles were omitted; and such entry, with the other particulars, should be specified in the libel.

U. S. vs. Reed, 1 Low., 232.

FOURTH COUNT. That the said goods, wares and merchandise were on the day of , one thousand eight hundred and , imported and brought into the United States, in the ship or vessel, name unknown, belonging in the whole or in part to a citizen or citizens, inhabitant or inhabitants of the United States, from a foreign port or place, and were not included in the manifest, and belonged to or were consigned to the master, mate, officers and crew of such ship or vessel, contrary to section 2809 of the Revised Statutes of the United States (Rec., 4.)

If the preceding counts are bad, the fourth is pre-eminently so; for it combines the defects of all! It states no time, within or without the Statute of Limitations; (U. S. vs. Winslow, 3 Sawy., 337.) no port, foreign or domestic; no ship; no owner; nobody on her shipping articles, in any capacity, as consignee; no manifest;—indeed, no fact of any time, place, person, nor circumstance whatever!

It omits to state the existence of any manifest in which they should have been (but were not) included. It cannot be held to have done any more than to suggest a doubtful inference of such a document.

Evidently, this particular section contemplates that the prosecuting officer shall know of a *domestic* vessel, whose register and crew-list, etc., will show name, ownership, master, officers and crew; of whose cargo a manifest has been handed in, and the libeled goods not mentioned therein; and these particulars should be specified.

FIFTH COUNT. That on or about day of , one thousand eight hundred and , an un-

known person did fraudulently and knowingly import and bring into the United States, and assist in so doing, the said goods, wares and merchandise, contrary to law, and did receive, conceal, buy, sell, and in some manner facilitate the transportation, concealment and sale of such goods, wares and merchandise, after their importation, knowing the same to have been imported contrary to law, contrary to section 3082 of the Revised Statutes of the United States. (Rec., 4.)

(Is it any offence, 'import'?)

And the *fifth* is like unto its predecessor!

Being as vague, as to time, place, person and circumstance as the others, it only justifies its insertion by bringing into the libel new defects peculiar to itself!

It is bad for duplicity.

It jumbles up in one count offenses in their nature distinct.

The importation is a distinct thing, in law and in fact, from the subsequent dealings in the imported articles. The count recognizes this. It says an unknown person made, or aided in making, the importation; and that "after their importation," the same incognito did something or other with relation to them, knowing of their illegal importation.

U.S. v. Carroll, 32 F.R., 776.

It should state *how* the importation contravened law.

U. S. vs. Claflin, 13 Blatch., 186 and 97 U.S., 552, bot.
Burroughs on Taxation, 584.

The importation is complete before the goods are unloaded, or received by anybody.

U. S. vs. Vowell, 5 Cranch, 368.
Arnold vs. U. S., 9 *Id.*, 104, and many other cases.

Under R. S., § 1024, where there are several charges for the same transaction, or for two or more connected together, or of the same class, though they may be joined, it must be in "separate counts."

Each count in judgment of law, charges a separate and distinct offense."

U. S. vs. Malone, 20 Blatch., 140.

As to the meaning of a similar provision in the N. Y. Penal Code (that it is as here contended), see the recent decision of the Court of Appeals in

Peo. vs. Dumar, 106 N. Y., 502,

attracting my attention after this brief was ready for the printer.

"Two crimes cannot be charged in the same Count and judgment will be arrested for such defective pleading."

U. S. vs. Corbin, 11 Fed. Rep., 239.

In a recent case, it was held that forgery of an instrument and uttering the same could not be united in one count.

Peo. vs. Van Alystine, 57 Mich., 75.

To carry for sale, offer to sell, and to obtain orders for, prohibited goods held to be three offenses, created by a single section, and not to be joined in one count.

State vs. Smith, 61 Maine, 386.

This count says the importation, etc., was by some unknown person, and that he furnished undefined facilities of transportation.

This cannot be. The name of the importer may be unknown; but if the prosecutor knows *nothing* about him, nor about the port, vessel, facilities and dealings, he *cannot* know of any offense, of which these are necessary incidents.

This is, moreover, a defective count upon a *repealed* statute.

At least, the offense of introducing dutiable goods clandestinely, without paying duty thereon, with intent to defraud the revenue, is provided for by the Amend-

ment made Feb. 17, 1877, to R. S., § 2865 (19 Stats., 247).

U. S. vs. Claflin, 97 U. S., 546.

This Court, in the cited case, held that Sec. 3082 only contemplated a proceeding by indictment. (*Ib.*)

AS TO ALL THE COUNTS: we repeat that *no one of them charges any "actual intention to defraud."* They illustrate "the perverse propensity of most people to try how far they can deviate from the requirements of a statute without forfeiting the benefit of its provisions." The experiment usually results in failure.

Ingalls vs. Chase, 68 Me., 120.

"But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them."

U. S. vs. Cruikshank, 92 U. S., 559.

"And when the want of jurisdiction is apparent upon the face of the *declaration* by reason of *an omission of the statement of the facts requisite to bring the case within the cognizance* of the Court it is *well settled* that the defendant may *take advantage of such omission either* by motion (at any time before judgment) to dismiss the suit; or, after verdict, he may move in arrest of judgment; *or, after judgment, he may bring a writ of error and have the judgment reversed.*" (Rec. 11, mid.)

Donaldson vs. Hazen, Hemp., 425, citing
Hope Ins. Co., vs. Boardman, 5 Cr., 57 ("not raised below" (*ib.*, 59.)
Abercrombie vs. Dupuis, 1 *Id.*, 343.
Mullen vs. Torrance, 9 Wheat., 536.
Jackson vs. Twentyman, 2 Pet., 136.
Lanning vs. Dolph, 4 Wash., 628, top.
Harris vs. Harris, 10 Wis., 467-8 and citations.

As the District Attorney did not seek to amend, at the time we moved to dismiss the libel as defective (Rec. 11 mid.), but chose to take his chances of the ruling of the District Judge being sustained, an amendment (if ever allowable in a *criminal* case) ought not now to be allowed, after we have been put to the delay and expense of an appeal to the Circuit Court, and thence here.

II.

The *judgment* does not base itself upon any finding of fraud, but only upon the general verdict of the jury "condemning the said goods" (Rec. 12, fol. 20).

III.

The Exceptions.

The exceptions may be conveniently discussed in two propositions, although one is dependent upon the other.

We objected to the conversations of Mrs. Sussman on the ground that (not being the owner) they were not admissible in derogation of the title; especially because made after she had ceased to have custody of the diamonds.

To meet the last objection, Capt. Brackett proposed to swear—and was permitted to do so—that, although he took physical possession of the property at 66 Nassau street, *before* the conversations, he did not make (because he did not so INTEND) the "actual seizure" until *after* they were had, and at the Custom House.

Thence these inquiries arise:

1. What constitutes a *seizure* of goods by an officer?

2. Were conversations of one *never being, nor claiming to be, owner of the goods*, but always to be acting in behalf of another, admissible in evidence against the principal; especially when made after the goods had been taken from the custody of the agent by exercise of the authority and force of law, and the agency thereby terminated?

The forty-three diamonds informed against were, on the afternoon of the 26th of February, 1883, left at the store of Goldsmith & Kuhn by a Mrs. Sussman, who brought them thither for sale, and left them over night for the purpose of safe keeping. From some source customs-revenue officers at this port obtained information of the transaction, and suspected the goods to be smuggled. Accordingly, on the next morning Capt. Brackett, special agent, "with *due warrant* therefor, (Rec., 4 mid.) went with his assistant to Goldsmith & Kuhn's store, where (as Capt. B. testified, Rec. 9, fol. 15) he found "the diamonds were in the possession of Goldsmith & Kuhn;" that Mr. Kuhn, who had the package, handed it to Capt. Brackett "upon the *demand* of it" (*Ib.*). He took the diamonds and carried them to the Custom House, taking Mrs. Sussman along with him. Upon reaching the Custom House, Capt. B. telegraphed for the Appraiser (Mr. Stevens), who came down and opened the package. In the meantime, *i. e.*, after their arrival at the Custom House, and before that of Mr. Stevens, Capt. Brackett had a conversation with Mrs. Sussman.

Obviously, Mr. Brackett's postponement of his mental operation of seizure was to get in this conversation.

The foregoing statement shows the bearing of the first exception to the admission of testimony; which

is to this question put to the seizing officer, and his reply thereto ;—

" *When* and *where* did you make the seizure of these diamonds ? " (Record, 8, top).

The admissibility of the question (in that form) is denied, because it left to the witness to decide upon what constituted a seizure ;—and it seems he considered it an emotion of the mind ; and not the physical taking of another's property " under due warrant " and while acting officially.

He should have stated what he *did*—his acts—to *sustain*, not to contradict, his pleadings as to the time, place and act of seizing. Then it would be for the Court to tell the jury what facts (if found) constituted a seizure. As it was, he swore to an *erroneous* conclusion of law !

The admissibility of the testimony must be considered with reference to the pleadings and the issues made by them. (See *ante*, pp. 22 to 24.)

Here, the information bases the whole claim of jurisdiction upon a seizure, made under warrant issued in conformity to R. S., § 3066, Feb. 27, 1883, *at No. 66 Nassau street.*

(See *ante*, p. 21, Rec. 4, fol. 7.)

" It is a rule of law that a finding which contradicts a fact admitted in the pleadings is to be disregarded."
McFerran vs. Taylor, 3 Cr., 280.
Walker vs. Brem, 67 Cal., 599, and citations *ante*, pp. 22 to 24.

Can an officer who goes, avowedly *as* an officer, with a warrant, to the place specified therein, and there *demands* and takes into his own possession property over which he has no right to exercise such control *except* as an officer, and under such warrant, be permitted to say that this action did not amount to a " seizure " of the goods, because of the existence of an alleged secret,

uncommunicated intention to postpone that effect, or, in the event of a possible contingency (which never happened), for it not to have that effect? (Rec., 8, 9).

Which shall govern? what he *then* said and did, under legal authority, or what he *now* pretends he thought and intended?

Especially, when the complaint truly states his acts.

The law does not recognize any right in its officers to "demand," take and detain the property of a fellow citizen, distinct from their authority to *seize*.

Nor does it require the official mind to be *satisfied* of illicit dealings with property *before* seizing it, but the contrary.

An executive subordinate, who is sent with a precept *directing* as well as authorizing him to *seize* certain articles, has no discretion, to examine persons to decide whether he will execute or disobey his mandate.

R. S., Sects. 3509 *et seq.* give revenue officers power to search persons, places and vehicles, and if it shall *appear* that there has been any violation of law to seize any merchandise which there is "reasonable cause to believe subject to duty;" but this does not apply to the case of an officer whose warrant *requires* him to seize.

The seizure is upon suspicion. Whether to persevere, or to abandon it, is to be determined upon such circumstances as may subsequently appear. (Church vs. Hubbart, 2 Cr., 234.) But, where an officer goes to execute a "due warrant," directing him to search for and seize, it is not *his* suspicion but that of the collector, that suffices to obtain and execute the warrant.

The title to smuggled property is not devested until actual seizure; then it relates back to the act of forfeiture. (Clark vs. Ins. Co., 1 Story, 134, mid.) Judge Story, certainly, meant to state the devestiture of title as contemporaneous with the actual taking of property into custody by a revenue officer, upon the ground of its liability to forfeiture.

This Court would surely hold, upon the evidence, if

the question ever became material, that Mrs. Friedenstein's title (in the event of forfeiture decreed) was devested at the moment Capt. Brackett *demanded* and took those diamonds from Mr. Kuhn, at his store, No. 66 Nassau street.

Even if Capt. Brackett's official position, precept, and claim to be acting under it, asserted when he made "*demand*" and took possession of the property—left any *locus penitentiæ*, this would make no difference, inasmuch as the diamonds never were returned, but the custody thus obtained has been ever since retained, and the taking avowed to be a seizure, as a basis for the present libel of information.

What is a "seizure?"

"The taking possession of goods for a violation of a public law; as, the taking possession of a ship for attempting an illicit trade." Bouv. L. D., *h. t.*

"Seize * * * to take possession of." Webs. Dict.

"There must be an open visible, *possession claimed*, and *authority exercised* under a seizure. The parties must understand that they are *dispossessed*, and that they are *no longer at liberty to exercise any dominion* on board of the ship," or over the thing.

The Josefa Segunda, 10 Wheat., 325.
The Silver Spring, 1 Sprague, 551.
The Fideliter, 1 Sawyer, 153.

A seizure by an officer is the act of assuming control by virtue of his authority.

Greene vs. Pac. Ins. Co., 9 Allen, 222.

"As applied to subjects capable of manual delivery, the term means caption; the *physical taking into custody*."

Pelham vs. Rose, 9 Wall., 106.

If *un*official persons make a seizure, the Government

may adopt it; and such adoption relates back to *the moment of taking.*

Caledonian, 4 Wh., 103, close of Op.

The Government counsel below (jocosely or seriously) referred me to the position assumed by me, and the opinion of the court, in the case of the

U. S. vs. 4 Packs., 97 U. S., 411–2.

The law of that case applies to its facts; and, as to the very point to which the Government now quote it, the facts differentiate it from the one at bar, in this: the four packages had never gone into the control of the owner; they were never delivered to him, but held (from the moment the inspectors went on board) for the purpose of the final examination.

Hence, there was no manual taking out of his possession.

In another case, CLIFFORD, J. (who gave the opinion in that), says:

"Importation of goods is not complete, as between the importer and the Government, *so long as the goods remain in the custody of the officers* of the customs," etc

U. S. vs. Benzon, 2 Cliff., 525–6.
Mottram vs. Heyer, 5 Denio, 629.

Moreover, the Court say (in 97 U. S., at p. 409) that the parties went to trial "pursuant to the issues"; and that it was "evidence to prove the allegations of the information" (*Ib.*) that was introduced by the District Attorney. Here, it was evidence outside the issue, and to contradict the information!

In that case, there was no pretext of any purpose to seize before reaching Castle Garden.

So, the Court below were again misled by a correct, but inapplicable, decision.

There is nothing so likely to deceive as a false analogy.

IV.

As to the alleged conversation with Mrs. Sussmann:—

Whether the technical name given to Capt. Brackett's acts is to be determined by their physical appearance or by his secret, contingent, mental intention, the legal effect is the same.

In either case, *Mrs. Sussman's agency was terminated* by the forcible taking from her of these diamonds. *That* is the real point. It makes no difference *how* such an agency is terminated; whether by revocation, by complete performance of the business for which it was created, or by interruption and operation of law. The *effect* is the same in each case. With the termination of the agency, especially when accompanied by the surrender of the entrusted goods, ends all the power of the agent to affect the principal by declarations. They cannot, then, be any part of the *res gestæ*, since there is then nothing more for the agent to do.

Story on Agency, §§ 134 *et seq.*
Dunlap's Paley, *270.
Packet vs. Clough, 20 Wall., 540–1.
Ins. Co. vs. Mahone, 21 *Id.*, 157.
Luby vs. R. R., 17 N. Y., 133.
Wilson vs. Bowden, 113 Mass., 422.

Mrs. Sussman's statements were purely narrative. If the Government accepts them, they must be taken together; and the first and often repeated one was a disclaimer of all ownership of, or personal interest in, the goods.

The facts bring this case clearly within that of

U. S. vs. JEWELRY, 13 BLATCH., 60.
Dodge vs. Freedman, 93 U. S., 379.
Whetmore vs. Murdoch, 3 W. & M., 385, bot.
Many vs. Jagger, 1 Blatch., 372.
Milleck vs. Peterson, 2 Wash., 31.
Sherman vs. D. & L. R. R., 106 N. Y., 546–7.

Mrs. Sussman was only an agent to sell. (Rec., 9, top.) As such, her power was limited to carrying out that object. She could only sell for cash. (Sch. Dist. vs. Ins. Co., 62 Me., 338.) She could not prevent any sale by disparaging or destroying the title of her principal by any statement of a past event. Citations *supra*.

Bynum vs. Smith, 63 Ala., 462.
Henry vs. No. Bk., *Ib.*, 537.
Grimshaw vs. Paul, 76 Ill., 164.

The attempt to postpone the seizure until after the conversation was a futile effort to evade the decision in the jewelry case (13 Blatch., 60); having temporary success, through the ruling of which we here complain. (See the preceding division of this brief.)

Mrs. Sussman was a witness. (Rec. 11, fol. 19.) The admission of Capt. Bracket's testimony as to her statement reduced the trial to a bare question of veracity between him and her—whether she did or did not make it—*there being no evidence of the existence of the fact she is said to have admitted;* so our title was made to stand or fall by the jury's opinion of the veracity of our mere agent to sell.

EDWIN B. SMITH,
120 Broadway,
Of Counsel for Claimant.

125-224

125-224

In the Supreme Court of the United States.

OCTOBER TERM, 1887.

AUGUSTA FRIEDENSTEIN, CLAIMANT of one package containing forty-three diamonds, plaintiff in error,
vs.
THE UNITED STATES.

No. 178.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF OF ARGUMENT.

I.

The errors assigned raise two questions:

First. Is the information sufficient to sustain a declaration of forfeiture?

Second. The competency of the testimony of declarations of Mrs. Sussman, as set forth in the assignment.

The learned counsel for the plaintiff in error has cited many authorities to show that the information would not be sufficient as a criminal indictment charging the defendant with a crime. Whether he has sustained this proposition or not we regard as immaterial, as this is a proceeding *in rem*, civil in its character, and not criminal. The ordinary rules of civil pleading in cases of this character are much less rigid than in ordinary common law actions. In this case the claimant, without objection to the sufficiency of the pleading, went to trial, took her chances before a jury, did not claim to not have been sufficiently informed of the subject-matter in dispute, and was fully prepared with her testimony to meet the allegations of the United States. In such cases the verdict cures every defect, except the statement of a defective cause. In the case of *Lincoln* v. *Iron Company* (103 U. S. R., 415), the rule as to the curing of defective pleading by verdict is clearly stated as follows:

> It is a rule of the common law that where there is any defect or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give the verdict, such defect or omission is cured. 1. Wms. Saund. 228. Or, as it has been tersely put, a verdict cures a defective statement of a title or cause of action, but not the statement of a defective title or cause of action.

In the "Confiscation Cases" (found in 20 Wallace, 104) the rule with reference to pleadings in proceedings *in rem* is thus stated and discussed by Justice Strong.

As was said in *Miller* v. *United States*, proceedings under the fifth, sixth, and seventh sections of the confiscation act are proceedings *in rem*, and they are required to conform as nearly as may be to proceedings in admiralty or revenue cases. They are in no sense criminal proceedings, and they are not governed by the rules that prevail with respect to indictments or criminal informations. It may be conceded that an indictment or criminal information which charges the person accused in the disjunctive with being guilty of one or another of such offences would be destitute of the necessary certainty and would be wholly insufficient. It would be so for two reasons. It would not give the accused definite notice of the offense charged, and thus enable him to defend himself, and neither conviction or acquittal could be pleaded in bar to a subsequent prosecution for one of the several offenses. But in proceedings against real or personal property, to obtain a decree of condemnation and forfeiture under the confiscation act, *liability of the property seized to confiscation is alone the subject of inquiry*. No judgment is possible against any person * * *. It may be, the information might have been more artificially drawn, and that if the owner had appeared in answer to citation he might have interposed successfully special demurrer; but after default was made and entered, and after a final judgment of condemnation, faults in the mode of pleading, mere formal faults, cannot be of any importance. They cannot have injured any one. If the information set forth, though informally a substantial right of action it was sufficient, and the judgment cannot be disturbed because of such faults.

The case now under consideration is much stronger than a case of a default, for the claimant was present in court. She is presumed to have known her right, and

her duty, to demur for any defects which might exist in the information. By declining to demur, she practically waived that right, if it existed. The finding of the jury has more legal force than a mere default, for it not only shows that the forms of the law have been complied with, but that the claimant had the actual opportunity to seek for justice, and availed herself of that opportunity. In the case of *The Palmyra* (12 Wheat. 12) the rule as to pleadings in proceedings *in rem* is thus stated:

> In reply to the first objection it must be admitted that the libel is drawn in an inartificial, inaccurate and loose manner. The strict rules of the common law as to criminal prosecutions have never been supposed by this court to be required in informations of seizure in the admiralty for forfeitures, *which are deemed to be civil proceedings in rem.* Even on indictments at the common law, it is often sufficient to state the offense in the very terms of the prohibitory statute. The cases cited by the Attorney-General are strictly in point. In informations in the exchequer for seizures, general allegations bringing the cases within the words of the statute, have been often held sufficient. And in this court it has been repeatedly held that in libels *in rem* less certainty than what belongs to proceedings at common law, will sustain a decree of condemnation, if the words of the statute are pursued, and the allegations point out the facts so as to give reasonable notice to the party to enable him to shape his defense.
>
> There is indeed in admiralty proceedings little ground to insist upon exactness of averment because in view of the general terms the offense may be articulated, it is always in the power of the court to prevent surprise by compelling more particular charges as to the matter intended to be brought forward by

> the proofs. In general, it must be that it is sufficient in libels *in rem* for forfeitures to allege the offense in the terms of the statute creating the forfeitures.

In all the several counts in the information under consideration, the statute prescribing the forfeiture is followed in the information. Special exception is taken to one of the counts on the ground that the dates are left blank. The date of the seizure is properly stated. The language of the statute under which the forfeiture occurred is properly referred to, with every material fact therein called for charged in the information.

As to the omission of dates, after verdict, the rule with reference to such an omission is stated in the case of *Stockton* v. *Bishop* (4 How., 167) as follows:

> The second count refers to the first for the dates of the circumstances and the injury complained of, and as no time is given in the first count, neither has this any. The plaintiff in error having pleaded not guilty and gone to trial, the presumption is that the proof supplied the defective statement. Such we suppose is the uniform rule where material dates are left blank.

Another complaint against one of the counts in the information is, that it is defective for duplicity, in that it charges two separate offenses in the same count. In proceedings *in rem* this is not a fatal defect. The very subject was passed upon in the case of *The Emily and The Caroline* (9 Wheat., 100) as follows:

> Under this law then, the forfeiture is incurred either by fitting out, or, in other words, preparing a vessel within the United States; or by causing a vessel

> to sail from the United States for the purpose of carrying on the slave trade; two distinct acts, either of which draws after it the same consequence, the forfeiture of the vessel. The informations embrace both acts in the same count, pursuing the words of the law; and it is contended that on this account they are fatally defective, that one or the other of the acts should have been alleged, and not both stated in the alternative, as has been done. Objections of this kind made at so late a period if not entirely precluded are not entitled to much indulgence. They ought, if well founded, to be made at an earlier day, when the information might be amended, and great expense and delay avoided. But the exception would at no time be available. In admiralty proceedings a libel in the nature of an information does not require all the formality and technical precision of an indictment at common law. If the allegations are such as plainly and distinctly to mark the offense, it is all that is necessary. And where it is *founded upon a statute, it is sufficient if it pursues the words of the law.*

The several sections of the statute under which forfeiture accrued, with the corresponding counts of the information, are herewith printed as an appendix.

But it is claimed that the sixteenth section of the act of 22d of June, 1874 (18 U. S. Stat., 189), changes the law with reference to pleadings, and requires an incorporation into every statute declaring forfeiture that the acts were done with an actual intention to defraud the United States. That section provides as follows:

> That in all actions, suits, and proceedings, in any court of the United States now pending, or hereafter commenced or prosecuted, to enforce or declare the forfeiture of any goods, wares, or merchandise, or to

recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs revenue laws, or any of such provisions in which action, suit, or proceeding, an issue or issues of fact *shall have been joined*, it shall be the duty of the court on the trial thereof to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require, upon such proposition, a special finding by such jury; or if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact, and in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed.

This statute prescribes a rule of practice, not of pleading. The mode in which this proposition shall be submitted to the jury is fixed specially by the act. The act requires that after the issue or issues shall have been made up, the actual intention to defraud shall be submitted by the court to the jury, as a separate proposition, and that the jury shall find a special verdict thereon. The statute requires that the record shall thus be made up.

If it were necessary to allege the intent in the information, a general finding would cover all that the statute thus prescribes the jury shall specially find. In this case the question of actual intent to defraud was submitted by the court to the jury as a distinct and separate proposition, and the jury specially found the fact as follows:

Charge is made by the court, and the jury retire in the custody of an officer competent to conduct them, and upon its return rendered a verdict for the inform-

> ants, and against the claimant, for the condemnation of the goods mentioned in the information, *and that the acts complained of therein were done with intent to defraud the United States.* (R., p. 11.)

This is a special statutory provision. The special requirements of the statute have been fully complied with. The record shows that the question of intent, in precise conformity to law, was submitted to the jury, and they have found the special verdict required by the statute. The information is but a part of the record. The record, as a whole, shows that everything required to warrant the forfeiture was passed upon and found by the jury. The subject of the intent of this statute is fully discussed in the case of *The United States* vs. *Curtis* (16 Fed. Rep., 190) by Judge Brown, as follows:

> It is claimed on part of the defendant that this section means an intent to defraud on the part of the person sued. The statute does not say whose intent is referred to. What is required to be submitted to the jury is whether the alleged acts were done with intent to defraud. I have no doubt that under this section it is the duty of the court to submit to the jury, the question whether the prohibited act was done with the intent to defraud on the part of those who committed it. In the case even of an unlading of goods to avoid loss by fire or the sinking of the ship, the jury might find that the removal was or was not also accompanied with the intent to smuggle the goods unladen. In the present case the question was submitted to the jury and they found that the alleged acts were done with the intent to defraud, but that the master was not privy to it. I think the intent referred to in this section does not

include the intent of masters of vessels who are made responsible for the illegal and fraudulent removal of goods by persons under their control. *The alleged acts referred to are the acts necessary to set forth in the suit as the legal cause of action, and the intent referred to is the intent with which the acts were done by the persons who did the acts.* Section 16 applies to that extent, and, in my judgment, no further. The only acts needed to be set forth in a suit for a penalty are those pertaining to the unlawful unlading of the goods. If these acts were done with intent to defraud, then the master is by statute made liable to the penalty on account of his presumed power to prevent it.

These proceedings for forfeiture are proceedings *in rem*. The thing itself is the defendant. Those who do the acts with reference to the thing, or speak for it, are only the mouth-pieces of the defendant. The defendant could have no intent. Intent in the sense in which it is used in criminal statutes must of necessity be applicable only to a person. The intent is only descriptive of the act which subjects the thing to the forfeiture, but this element of description must be found by the jury. But all the substantial elements from which forfeiture ensues are set forth in the several acts declaring the forfeiture. If all of those acts are done, then the intent is only an additional element of description, which, as evidence, the law declares shall be submitted to the jury in the mode prescribed by the statute, and found specially and independently of the allegations contained in the information. When this is done, as it was done in this case, the full requirements of the law are met.

II.

The first error assigned to the admission of testimony is the reply to the question, "When and where did you make the seizure of these diamonds?" (Rec., p. 8.) The reply of the witness was, "The seizure of the diamonds was made at the custom-house in this city, after I was through with my investigation."

The objection to this question was that it called for a conclusion of law. Actual seizure is a question of fact. In this case the diamonds had been found in the possession of Goldsmith & Kuhn. When in their possession Mr. Kuhn stated concerning the diamonds: "I have a package here that this lady left last night." (Speaking of Mrs. Sussman.) His declaration when in possession of the diamonds might not be enough to justify the officer in executing his warrant upon them. He must necessarily identify the goods as those called for in his warrant. Until he had thus identified and actually determined that they were the goods described in his warrant, a final seizure should not be consummated, although he might handle and examine the goods, and investigate as to the identity of the goods with those described in his warrant. Reasonable time would be allowed him to make this investigation before the final act of seizure would be consummated. When the final act of investigation which satisfied his mind as to the propriety of the seizure had been consummated, it was entirely competent for him to testify and to state when he had seized the goods. Section 3059, Revised Statutes, and subsequent sections of the same title, clearly contemplate that an investigation shall precede the

seizure. Even were it not so recognized by the statute, an intelligent administration of the law would not only warrant but require it.

In the case here spoken of by the officer making the seizure, although he may have had possession of the goods before the time he alleged the seizure to have taken place, yet he substantially states that they were only in his possession up to the time he proves the seizure, for the purpose of investigation. When that purpose had been accomplished, it was entirely competent for him to prove the actual seizure took place, and it is no contradiction of the record, nor of any part of it.

III.

The sixth exception is to the admission of the answer to the following question propounded to Captain Brackett:

> Now state the conversation between Mrs. Sussman and yourself which occurred prior to the actual seizure of those diamands in the custom-house, and on the same day when she went in company with you to the custom-house with the diamonds.

The objection to this question is in the following language:

> The claimant objected to this question because Mrs. Sussman's statement, under the circumstances, and at that time, could not affect the claimant. Also because the question involved was a question of law as to when actual seizure took place.

In reply to the last branch of this objection, the question of when the actual seizure took place is, as above sug-

gested, a question of fact and not of law. The mere fact that an officer may have a warrant to make a seizure, by no means implies that he makes the seizure at the first opportunity, nor does that fact imply that a seizure is ever made. If an officer with a warrant commanding him to make a seizure, should fail to make the actual seizure, another, notwithstanding his warrant, might make an actual seizure, which would prevent the execution of his warrant altogether. To hold a warrant, and to execute that warrant, are two different transactions, and when the actual seizure took place was not a conclusion of law.

The reply to the question is as follows:

> Well, I asked Mrs. Sussman, from whom she got the diamonds. She said they belonged to another party, but she could not give the name of the party, neither would she give her own proper name. I told her, "If you can give a satisfactory explanation, and if these goods have been brought into the port properly, and duties paid, the United States Government don't want them; why do you object?" "Well," she says, "I can't mention the name of the lady to whom these stones belong." Well, she finally said to me, after some twenty minutes, perhaps, of conversation—there were two other parties in the room, Mr. Cohen sitting outside, and the door open—she said, "I would like to see you in private." Well, said I, "These are my offices here; this is all private—these offices." "No," said she, "I want to speak to you alone." Well, I went into the adjoining room with her, and she then said to me, "These diamonds belong to a lady, as I said before, whose name I won't give. The duty has not been paid on these diamonds. I am ready to go now before the

collector and make arrangements to have the duties paid." "Well," said I, "I can not do that, madam." "Well," she says, "I am ready; it can't be over four hundred dollars." I then went back to the room and told her that I could not make any such arrangement with her as that. The diamonds were then under seizure. *Then I made up my mind to seize them after this conversation.* She said the duty would not be over four hundred dollars; she was ready to go before the collector and make arrangements to pay that duty.

The circumstances which preceded this conversation were that the diamonds were found by the officer in possession of Goldsmith & Kuhn. This Mrs. Sussman was at their store. The officer asked Mrs. Sussman if she had any diamonds with her. Mr. Kuhn, in whose possession the diamonds were found, is presumed to be authorized to speak for them. He said, in the presence of Mrs. Sussman, "This lady (referring to her) left them with me last night." This connects Mrs. Sussman with the possession of the diamonds, and with Goldsmith & Kuhn as her agents. If they, as her agents, had a right to speak, she as their principal had an equal right, and either one might speak for the diamonds, which were in the constructive possession and under the control of Mrs. Sussman. The officer asked her, "Madam, is this your package?" She says, "Yes." This was while the diamonds were yet in the possession of Kuhn.

After this the officer, for the purpose of investigation, took possession of the goods, and was accompanied by Mrs. Sussman. His possession was not absolute, or unconditional, but it was substantially stated that if she, in

whose possession the diamonds were originally found, could give a satisfactory explanation, that possession would be only temporary and qualified. Her original possession, subject to this explanation, was not interfered with. Until the officer should bear the same relation to these diamonds that she did when she delivered them to Goldsmith & Kuhn, she had a right to speak for them, was their proper mouth-piece, and what she said they were bound by. What occurs at the time of a seizure by an officer, with the possessor of goods is a part of the *res gestæ*.

Until the exclusive and unconditional seizure is actually made, all that transpires between the party in possession at the time the seizure is commenced, until the final seizure is made, is one transaction, every part of which is admissible. A seizure, when consummated, becomes a unit, but while *in fieri*, it may consist of several steps—a provisional qualified possession for investigation or examination as to the propriety of seizure, an investigation, and the ultimate seizure. The person in whose possession the goods were found prior to the first step, if present, through all the consecutive steps of this transaction, is authorized to speak for the thing seized. Everything that Mrs. Sussman said concerning these diamonds, which was proven by Brackett and Palmer, was done during the course of the several steps involved in the actual seizure. As to the continuity of the several steps resulting in a seizure, see *U. S.* vs. *Four Packages*, 97 U. S. R., 411.

In case the information in a cause should be found deficient, and the evidence sufficient to show a breach of the law, the practice has been to remand it to the court be-

low for amendment. See *The Brig Caroline* vs. *U. S.* (7 Cranch, 500); also *The Edward* (1 Wheat., 261); 4 How., 131; *U. S.* vs. *Weed* (5 Wall., 62). If, in this case, the court shall find the information defective, it is moved that it be remanded for amendment.

G. A. JENKS,
Solicitor-General.

APPENDIX.

FIRST COUNT.

That the said goods, wares, and merchandise were brought in the ship or vessel, name unknown, from ———, a foreign port or place, and were on the —— day of ———, one thousand eight hundred and eighty-two, unladen and delivered from such ship or vessel within the said port and collection district, without a permit from the collector and naval officer for such unlading or delivery, contrary to sections 2872 and 2874 of the Revised Statutes of the United States, and that the value of said goods, wares, and merchandise, according to the highest market price of the same, at the said port and district, amounts to four hundred dollars.

SEC. 2872. Except as authorized by the preceding section, no merchandise brought in any vessel from any foreign port shall be unladen or delivered from such vessel within the United States but in open day—that is to say, between the rising and the setting of the sun—except by special license from the collector of the port, and naval officer of the same, where there is one, for that purpose, nor at any time without a permit from the collector, and naval officer, if any, for such unlading or delivery.

SEC. 2874. All merchandise so unladen or delivered contrary to the provisions of section twenty-eight hundred and seventy-two shall become forfeited, and may be seized by any of the officers of the customs; and where the value thereof, according to the highest market price of the same at the port or district where landed, shall amount to four hundred dollars, the vessel, tackle, apparel, and furniture shall be subject to like forfeiture and seizure.

SECOND COUNT.

That the said collector, having cause to suspect a concealment of goods, wares, and merchandise in the particular dwelling-house, store, building, or other place No. 66 Nassau street, in the city of New York, did, on the 27th day of February, one thousand eight hundred and eighty-three, with due warrant therefor, enter the said No. 66 Nassau street, in the day-time, and there search for such goods, and did then and there find the said goods, wares, and merchandise concealed, and did seize and secure the same for trial, and that the duties had not been paid or secured to be paid thereon, contrary to the said section 3066 of the Revised Statutes of the United States.

SEC. 3066. If any collector, naval officer, surveyor, or other person specially appointed by either of them, or inspector shall have cause to suspect a concealment of any merchandise in any particular dwelling-house, store-building, or other place, they, or either of them, upon proper application on oath to any justice of the peace, shall be entitled to a warrant to enter such house, store, or other place, in the day-time only, and there to search for such merchandise; and if any shall be found, to seize and secure the same for trial; and all such merchandise on which the duties shall not have been paid or secured to be paid shall be forfeited.

THIRD COUNT.

That the said goods, wares, and merchandise, being articles subject to duty, were, on the 27th day of February, one thousand eight hundred and eighty-three, found in the baggage of a person arriving in the United States, and were not, at the time of making entry for such baggage, mentioned to the said collector before whom such entry was made by the person making the same, contrary

to section 2802 of the Revised Statutes of the United States.

SEC. 2802. Whenever any article subject to duty is found in the baggage of any person arriving within the United States which was not, at the time of making entry for such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited, and the person in whose baggage it is found shall be liable to a penalty of treble the value of such article.

FOURTH COUNT.

That the said goods, wares, and merchandise were, on the —— day of ———, one thousand eight hundred and ——, imported and brought into the United States in the ship or vessel, name unknown, belonging in the whole or in part to a citizen or citizens inhabitant or inhabitants of the United States, from a foreign port or place, and were not included in the manifest, and belonged or were consigned to the master, mate, officers, and crew of such ship or vessel, contrary to section 2809 of the Revised Statutes of the United States.

SEC. 2809. If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel shall be forfeited.

FIFTH COUNT.

That on or about —— day of ———, one thousand eight hundred and ——, an unknown person did fraudu-

lently and knowingly import and bring into the United States and assist in so doing the said goods, wares, and merchandise, contrary to law, and did receive, conceal, buy, sell, and, in some manner, facilitate the transportation, concealment, and sale of such goods, wares, and merchandise after their importation, knowing the same to have been imported contrary to law, contrary to section 3082 of the Revised Statutes of the United States.

SEC. 3082. If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury

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